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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-341

FRANK P. PARISH and THEODORE F. PARISH,
Petitioners,

v.

MARYLAND and VIRGINIA MILK PRODUCERS ASSOCIATION, INC., et. al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

FRANK P. PARISH and

THEODORE F. PARISH,

Thorndale Farms,
Taneytown, Maryland
Petitioners in Proper Person.

The Paul M. Harrod Company, Baltimore, Maryland 21234

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IN THE

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No. ______

FRANK P. PARISH and THEODORE F. PARISH,
Petitioners,

v.

MARYLAND and VIRGINIA MILK PRODUCERS ASSOCIATION, INC., et. al.,[*]
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Frank P. and Theodore F. Parish prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland, entered in the above entitled case on May 5, 1971.

---

[*]
Merhl A. Adams
Harry W.T. Fouche
Upton F. Gladhill
Paul B. Harlan
William I. King
Walter A. Martz
J. Homer Remsberg
Charles C.T. Stull
H. Lehman Toms
David Weitzer
William H. Cockerill
William C. Crossman, Jr.
Luther L. Day
Lester W. Huff
Dr. Oscar S. Martin
Giles H. Miller, Jr.
Edward C. Norman
W.W. Sanford, Jr.
C.T. Sollenberger
Alton A. White
I.D. Van Metre, Jr.

CITATIONS TO OPINIONS BELOW

The complete record of the subject case is submitted herewith.

1. Opinion of the Court of Appeals, 242 A. 2d 512 (1968)

2. Motion to modify injunction filed July 11, 1969, denied September 11, 1969

3. Supplement to motion to modify injunction filed July 24, 1969

4. Motion for separate trial, filed September 10, based on the trust theory denied (October 17, 1969)

4A. Opinion of Court denying motion for separate trial, October 17, 1969 p. 299

5. Amendment to the bill of complaint in behalf of petitioners Wharff and Wenger (October 20, 1969).

6. Amendment to the bill of complaint by Parish (October 20, 1969)

7. Joint amendment to the Bill of Complaint and declaratory judgment filed November 18, 1969. (p. 301)

8. Ruling from the Bench December 16, 1969. (See P. 367). Trial Court opinion, January 5, 1970

9. Petition of Wharff and Wenger et. al., for rehearing (fd. January 14, 1970, denied February 4, 1970

10. Opinion of the Court of Appeals, May 5, 1971 (not reported)

11. Joint Motion for reargument filed June 3, denied, June 4, 1971 by letter (attached to supplement).

Items 1 to 11 of the above are printed in the Supplement hereto.

JURISDICTION

The judgment of the Court of Appeals was filed May 5, 1971. On June 3, 1971, Motion for reargument was filed.

On June 4, 1971, motion for reargument was denied by letter.

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254, and under the provisions of Rule 23.

QUESTIONS PRESENTED

1. Is the relationship and standard of care between the members of a farm cooperative, such as the respondent association, its officers and directors that of:

a. Trustee and beneficiary as contended by Petitioners, or;

b. That of stockholders of a Stock Corporation and the Corporation and its officers, as contended by the Court below?.

2. Have the Petitioners been deprived of their rights to due process of law in violation of the Fourteenth Amendment of the Constitution of the United States and Article 23 of the Bill of Rights of the Constitution of Maryland, by the Trial Courts failure to rule on their request for a Declaratory Judgment as to the Trust Relationship and denial of motion for separate trial of the trust question?

3. Why would finding the Association is a Trust, "Bring about a catastrophic situation"?

STATUTES INVOLVED

Article 27, Section 163 of the Maryland Code

Rule V.70 to V.84 of Maryland Rules of Procedure.

STATEMENT

Your Petitioners were milk producers and as members of the Maryland and Virginia Milk Producers Association (the Association), shipped their milk to the Association which was organized without capital stock under the provision of Article 23, Sections 349-377 of the Annotated Code of Maryland, 1967. The Association received milk from all of its members, approximately 4,000 in Maryland and Virginia, and processed and distributed it for them. Each month each member received a base payment for their milk and at the end of the year a pro-rate payment in cash and "Revolving Fund Certificates" representing the balance purported to be due after deducting operating and distribution expenses from gross receipts of the Association.

Ownership of the milk and all of the Association's assets is vested in the Members in direct proportion to the Patronage of each member, Title and Possession only, passed to the Association pursuant to the manifestation of intention set forth in the Association's Articles VII and VIII of Incorporation and its contracts with Members i.e., Exhibit A and B to the Bill of Complaint.

Title to Property (Milk
and Ownership

Quoting from pp. 519-520: (Volume 2 Pleadings).

> "In establishing the trust principal the Complainants direct the Court's attention to a judicial conclusion enunciated in previous litigation involving the Association of at least one of the essential elements necessary to the creation of a trust relationship between it and its members, Cf. *Maryland and Virginia Milk Producers Association v. District of Columbia*, 119 F.2d 787, 792 (D.C. Circ., 1941), viz, that title to the members' milk passed to the Association upon delivery to the latter; and upon other case law relating to the subject of Cooperative Associations.

Quoting the last three lines-page 24 of the Annual Report to Members for year 1962, Exhibit C-21:

"It is your association. You own it, you control it and it is operated wholly in your interest."

The Associations Members having been denied the right to even see the report by Professor Frank J. Dugan of his investigation of the Associations manufactoring division *in particular*, made to the Board of Directors February 12, 1964.

In February, 1965, your Petitioners filed suit against the Association, its officers and accountants charging "waste, illegality, gross negligence, culpable mismanagement, in the affairs of the Association, and *breach of trust and fiduciary duty.*" On February 14, 1969, a rehearing was held on Right by the Parishs' to represent themselves. After suit was filed, six other members of the Association intervened and the suit was carried forward as a derivative action. As the case proceeded, four of these intervenors withdrew.

To the Bill of Complaint, the defendants filed demurrers, which were sustained by the Circuit Court of Montgomery County without leave to amend. This decision was appealed. In Parish v. Maryland and Virginia Milk Producers, 242 A.2d 512, 250 Md. 24 (1968) (page 1 of Supplement), the Maryland Court of Appeal, the Court below, reversed the order of the chancellor and remanded the case for further proceedings. Prior to the trial of this case, the Court made the following statement. We quote the Trial court from transcript of hearing October 17, 1969, page 17, line 23 (T. 297-298).

> "The Court's disposition of these matters and the Court's ruling with respect *to the trust theory, which we in effect sustain* at this stage of the proceedings, necessarily indicate at this stage and certainly prior to trial, the necessity for the Complainants specifically to amend the Bill of Complaint in order to state a cause of action more clearly and to amend their prayers for relief rather than rely upon the general prayer for relief that is set forth in the last prayer of the Amended Bill of Complaint."

> "As to the Complainant's class action for breach of an incorporated trust, therefore, the motions for summary judgment are denied."

Your Petitioners filed, pursuant to the courts admonition, a joint amendment to the third amended Bill of Complaint. Under this amendment, your Petitioners specifically alleged that the relationship between the Association and its Directors and the members of the Association was that of Trustee and Beneficiary, and requested a Declaratory Judgment as to the above relationship which was not ruled on, the Motion for a separate trial was denied. *The case was tried without benefit of the law applicable to the duties and standard of care universally accepted as binding upon a trustee, thereby depriving the Petitioners of a fair trial and the benefit of the law as it applies to Trustees and the legal rights of all beneficiaries.* The trial Court ruling: (Dec. 16, 1969–Opinion Fd. January 5, 1970);

> "In the course of argument here, today and previously, there had been a discussion, it has been urged upon the Court, that there was an agency relationship here rather than a Trust relationship, and the contract and by-laws in this situation are cited for the use of the agency terms.
>
> "In this wise, we have referred to the treatises and to the cases. *We think Scott on Trusts supports the position of Complainants in this case;* that they are not without remedy *and there is a fiduciary relationship subsisting between the members and the Association* as a result of the consignment to the Association of their produce.
>
> *"It is urged upon the Court in this connection that to so find would bring about a catastrophic situation.*

With this, we do not concur, and we say this for this reason: (Emphasis supplied)

> "We do not think that the simon-pure relationship that governs between cestui que trust and trustee are necessarily imported into the relationship that subsists between the Association and its members. See Scott on Trusts. Volume Five, Section 495, at page 3534.

> "In other words, we think there is a fiduciary relationship which gives these former members a right to maintain this action, but we, nevertheless, *find and hold* that the standard applicable to the directors upon the Bill of Complaint of the complainants in this case is the same standard as would apply generally with respect to the officers and directors of a stock corporation or a commercial organization which is a corporate entity. That standard we are all familiar with namely, that such officers and directors are liable for gross and culpable negligence."

It is submitted that this is directly contrary to statutes and the established law also the Court of Appeals previous finding in the present case (242 A.2d 5 (7)):

> "It is clear that Officers and Directors of a corporation stand in a sufficiently confidential relation to the Corporation's stockholders to impose a duty upon them to reveal all facts material to the corporate transactions. A.B.C. Packard, Inc., v. General Motors Corporation, 275 F.2d 63 (9th Cir. 1960). See 37 C.J.S. Fraud 16, page 248. *The confidential relations even more apparent in member corporation such as the Association.* The allegations of the Complaint indicate that the members have not been properly informed by the officers and directors

of the Association in regard to various transactions set forth in the Complaint and indeed, that the members have been deceived by the false annual reports." (Emphasis supplied)

Quoting from *Atlanta Trust Co., et al. v. National Bondholders Corporation,* No. 12942 Supreme Court of Georgia, Sept. 15, 1939, 4 S.E.R.2d series; 644:

> "It is imperative duty of an accounting party, whether an agent, a trustee, a receiver, or an executor (for in this respect, as was remarked by the lord chancellor in *Lord Hardwick v. Vernon,* they all stand in the same situation), to keep his accounts in regular manner, and to be always ready with his accounts." Where a fiduciary relation exists, an accounting in equity is proper. Code, § 37-301. In the case of *Dill v. McGehee,* 34 Ga. 438, 441, it was asked: "What objection is there on the part of the trustee, if he has acted in good faith, to coming into a Court of Equity, and making his own statement of his actings and doings respecting this property? *Let him show what he has received, and account for it;* that is all the bill asks of him. *Why should a faithful trustee be unwilling to come into a Court of equity and render an account of his stewardship? We know of no good reason.*" See Dowling v. Freely, 72 Ga. 557; Clark v. Wheatley, 113 Ga. 1074, 39 S.E. 437; Merritt v. George, 168 Ga. 497. 148 S.E. 334; Teasley v. Bradley. 110 Ga. 497, 35 S.E. 782, 78 Am. St. Rep. 113. [Emphasis supplied]

* * * * * * *

In *Atlanta Trust Co. v. National Bondholders Corp.,* 4.S.E.2d–page 649 supra, the court observed: "Of course, the defendant in this case, in a general

> sense, is a trustee. All executors, administrators, guardians, officers of corporations, directors of corporations, and numerous others are trustees in the sense that they occupy fiduciary relations and have been 'entrusted' with the property of others.
>
> * * * * * * *
>
> "All persons aiding and assisting trustees of any character, with a knowledge of their misconduct, in misapplying assets, are directly accountable to the persons injured. A long line of decisions by this court have applied and given effect to the principle announced in that Code section, among them, *Shivers v. Palmer, 14 Ga. 342; Hargroves v. Battey, 19 Ga. 130; Manning v. Manning, 61 Ga. 137; Bigham v. Coleman, 71 Ga. 176; Hickson v. Bryan, 75 Ga. 392; Anderson v. Foster, 112 Ga. 270, 37 S.E. 426; Atlanta Real Estate Co. v. Atlanta National Bank, 75 Ga. 40; Citizens' & Southern Bank v. State, 151 Ga. 696, 108 S.E. 161; Georgia Railroad Bank & Trust Co. v. Liberty National Bank & Trust Co., 180 Ga. 4, 177 S.E. 803.* That the bank may have received no benefit makes no difference. In Anderson v. Foster, supra. it was held: "One who aids and assists a trustee in misapplying trust funds, with knowledge of his misconduct, is directly accountable to the person injured by such misapplication, although the person thus assisting the trustee does not himself reap the fruits of the misappropriation."

As to the question of failure by Counsel for Appellants to further pursue the offer in evidence of the Price Waterhouse letters and reports, we cite the case of *Laun v. Kipp,* (155 Wis. 47, 145 N.W. 183.) 5 A.L.R. 655.

Page 665 "Pointing to the rule the trial court found a fatal defect in the complaint, in that there was an absence of any statement of facts showing the requisite diligence to bring the matter complained of to the attention of the court, and to show that they could have discovered the fraud in time to have availed themselves of its existence in the first action. On this branch of the case it seems to have been overlooked that respondent occupied a fiduciary relation to appellants. They had a right to rely upon his performing his duty prior to and upon the hearing before the referee. *He had no right to remain silent and challenge the proof, much less was he justified in placing a delusive statement before the referee and pretending, either expressly or impliedly, that it contained an exhibit of his transactions during the trustee period.* When the fiduciary position of respondent is considered and that appellants had used due care to employ attorneys whom they had reasonable ground to suppose were competent to protect their interests, the complaint shows such responsible failure for not presenting the matter complained of before the referee that a court of equity should not refuse to open its doors to prevent the success of a wicked scheme to cheat because of neglect at this point.

It was respondent who should have been the moving party as regards the accounting. Appellants had a right to suppose that he would exhibit a true statement of his trustee transactions; that the referee would see that he did it, and that appellants' attorneys would keep an efficient oversight in respect to the matter. It may be that appellants' attorneys were too unsophisticated in the matter; even that they were negligent, or possibly incapable of coping *with the particulars constituting the subtle deception said to have been practised by respondent; but where a party uses ordinary care in the selection of attorneys to represent him in such matters, equity may relieve him from the consequences of their infirmity or negligence. Wisconsin M. & F. Ins. Co. Bank v. Mann, 100 Wis. 596, 76 N.W. 777. It would be a strange weakness in our system of equity jurisdiction if a court could not or would not lend its aid to prevent a party from being greatly wronged by reason of his attorneys, either through negligence or otherwise, being imposed upon by the adverse party.*

–"The trial court seem further to have overlooked the fact that, according to the complaint, confirmation of the referee's report was opposed upon the ground that *respondent's pretended disclosure* of his transactions during the trustee period *did not make such disclosure at all; that only a misleading, deceptive statement was made with intent to deceive* the referee, and that, nevertheless, the report was confirmed and a re-reference refused *because respondent's attorney, persisted in urging upon the court the deceptive statement as containing a full disclosure of his trustee transactions,* whereas his administration in that regard was wholly omitted, thereby keeping from the knowledge of the court the fact that he had received $20,000, more or less, and converted the same to his own use.

* * * * * * *

"The dominant principle was all the court sought to proclaim. That was stated in these words by Chief Justice Marshall: "Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery."

The Court erred in accepting the accounting (record keeping) and auditing practices as proper in light of the disclosure of frauds and the standard applicable to such situations as set forth in "United States v. Simon, et al. 425 F.2d 796 Nos. 562-564 Docket 32828-32830. Certiorari denied 3-30-70, Johnson v. Sarver, 113 N.E. 2nd, P. 585, Laun et al. v. Kipp (155 Wis. 347, 145 N.W. 183, (A.A.R. 655), Erickson et al. v. Starling, 64 S.E. 832 N.C.

One of the major disclosures to date is the fact that the Defendant Association's own Accounting Department was excluded from any responsibility for, or knowledge of, the manufacturing division's operations. It is submitted that this disclosure alone called for the utmost scrutiny of every phase and factor.

The Court's attention is called to the following excerpts from transcript of testimony by Mr. Merrigan, series II. Volume III, P. 495, L. 14 to P. 497, L. 25 (T. 1033 and T. 1034).

> "Q. Now, just before the settlement you wrote the Association, that is Edward C. Norman and the President of the Association the letter which was received in evidence as D-131, a copy of which I am now showing you. A. I wrote Mr. Norman a letter on March 31, 1964, but I think, for the record, we should note that there are some notations on here and question marks that I didn't put on it.

Q. I am not showing you the copies that are in evidence, I am showing you the copy of a copy. A. Yes.

Q. This is my work? A. Yes.

Q. Now, in paragraph 8 of your letter of March 31, 1964, you say:

'Regarding item 7 of the Marshall-Snyder memorandum, the Board was fully aware of these imponderables when it voted to proceed with the settlement now. Some of these matters have been cleared up by Mr. Click's letter of March 19, 1964, which I sent along to you with my memorandum on March 25, 1964."

A. Could I see D-128?

"Now, I am showing you what is received in evidence as D-128. Is that the Marshall-Snyder memorandum that you have referred to in paragraph 8 of your letter of March 31, 1964? A. Apparently so."

Q. "And, therefore, when you said in your letter of March 31, 1964, regarding item 7 in paragraph 8 you were referring to item 7 of D-128 which reads as follows, from Marshall and Snyder to you:

'Since the Manufacturing Plant at Laurel has not been part of our responsibility, we have no prior knowledge of its detailed operation; i.e., other than anything appears on audited financial statements. Therefore, until such time as we can make a complete audit of the books at this Division, beginning with its

> *purchase in December, 1955, and such audit to include a current inventory of all real and fixed property by an independent appraisal company, we would not be in a position to answer your inquiry relative to the Laurel plant and its 'prior management.'*

It is respectfully submitted that such tampering with the normal responsibility of the supervisor of accounting, Mr. Paul Snyder, (see T. 1034) for the bookkeeping of the manufacturing division has far reaching implications and signifans with respect to the importance of a complete investigation and independent audit of the manufacturing division, by the COURT ON ITS OWN MOTION, if necessary,- (section 200.4 SCOTT ON TRUSTS. Also see, SPECIFIC ENFORCEMENT OF TRUSTS. Section 199.1. "The Court will specifically enforce this duty, and compel the trustee to render a proper accounting to the COURT."

(A) This duty is specifically provided for in Maryland rule of Procedure–Rule V.20:.

Rule V70, Definition,–"Fiduciary". "As used in Rules V71, to V84, inclusive, "Fiduciary" means a Trustee acting under a deed, will, declaration of Trust *or other instrument in the Name of a Trust*–whether the trust be created–Prior or subsequent to the effective date of this subtitle.

(B) In Maryland Code Art. 23 Sec. 386 it is held:

Article 23, § 386–"The Bylaws shall set forth rights and duties of members and directors–not inconsistent with–its Articles of Incorporation." (An. Code, 1951, § 360, 1941, Ch. 907, § 467.)

(C) Again in Maryland Code Art. 27 Sec. 163 it is stated:

Article 27, § 1963 "Failure or neglect to comply with terms of trust.

If any person or persons shall on his or their own behalf *** accept or take in trust from any person, *** any document giving or purporting to give title to or the right to possession of any goods *** or other personal property of any kind, under or subject to any written contract or agreement expressing the terms and conditionof such trust; and if such person or persons so receiving *** any document giving or purporting to give title to or the right to possession of any goods, wares or merchandise or other personal property of any kind shall, in violation of good faith, fail, neglect or refuse to perform or fulfill the terms and conditions of such trust as expressed in such written contract—"

The Trial Court,

A. Held that the Defendants were not negligent in their duties and dismissed the charges against them.

B. Failed to rule on the Declaratory Judgment requested and denied Complainant's motion for a separate trial, as to trust relationship.

C. Dismissed Frank P. Parish from the case, which dismissal was not ruled on by the Court of Appeals.

The Court below upheld the opinion of the trial court on all counts and in its rulings. Joint motion for reargument was denied June 4, 1971, by letter. The two remaining intervenors then withdrew.

In spite of the above, your Petitioners feeling that the pivotal issue involved namely, the Trust Relationship between the respondent association and its members, is a vital matter, not only to the members of the Association, but to all members of all such Cooperative Associations throughout the country, particularly as to the protection it affords against concealment of important actions, they are carrying on and are requesting this Honorable Court to review the decision of the Court below dealing with the responsibilities of Directors and Officers of such Farm Coopeartives and the basic rights of members. In doing so, your Petitioners have been seeking no personal gain, but have acted in recognition of the serious aspects and their importance to the well-being of the nations entire agriculture economy to the point of defeating the Department of Agriculture's efforts toward establishing a degree of price stabilization, as disclosed by the testimony of Thomas N. Neal. Jr., before investigator, Frank J. Dugan (pp. 20-21-Parish Rep. APX.): Admitted in evidence for limited purpose by stipulation. (Pre-trial order p. 535. Volume II of Pleadings).

> "(T. 2) Q. Would you state your full name and your address and your position with Maryland and Virginia Milk Producers Association? A. I am Thomas E. Neale, Jr. I live at 206 Regent Road, Norfolk, Virginia. I am Division Manager of Marva Maid Dairy, 550 Chestnut Avenue, Newport News, Virginia."
>
> "Q. Would you briefly describe that operation? A. Marva Maid Dairy is a fluid milk distributing plant in Newport News.
>
> (T. 5) Competition is between locally-owned dairies and national dairies, such as Sealtest Foods, and plants on the market there. The competition is

> very keen. Under Milk Commission regulations, you have a minimum price you pay producers for milk and a minimum price you may sell at wholesale and retail. Under Milk Commission regulations, you are not allowed to make gifts, supply cabinets, cases, and so forth.
>
> But, unfortunately, the Milk Commission so far has not proven itself capable of regulating itself–its own regulations you may say. And there is in the market today, as it has been approximately ever since I have been there, which is close to 28 years, situation where things are being done in the market and innumerable accounts that are in violation of the Milk Commission regulations."
>
> This in effect amounts to defrauding United States in *U.S. v. Pan-American Petroleum Co.*, D.C. Cal., 6 F.2d 43, affirmed in part and reversed on other grounds in part, C.C.A., *Pan-American Petroleum Co. v. U.S.*, 9 F.2d 761, affirmed 47 S.Ct. 416, 273 U.S. 456, 71 L.Ed. 734, it was stated to 'conspire to defraud the United States means primarily to cheat the government out of money or property, but also means to interfere with or obstruct lawful governmental functions by deceit, craft, or trickery, or dishonest means; ***

Your Petitioners contend that the courts' pivotal ruling was clearly erroneous and in conflict with rules governing trust as set out in "Scott on Trust" (Sec. 462.1), and the cases cited above, that either there is a trust relationship with all that is implied therein, or there is not. A trust relationship is and must be a simon-pure relationship or it is no trust relationship at all. It is this relationship that your Petitioners are seeking to be determined.

REASONS FOR GRANTING WRIT

That the association is a trustee in fact, *obviously,* is not enough in itself, to provide its members the highest duty to disclose and standard of conduct due trust beneficiaries. Without the court judicially declaring their relationship to be that of trustee and beneficiary of an express trust, all the law supporting the fact cited herein, becomes a farce as does the ruling of the court of appeals in the instant case (242 A.2d 539) (7) quoted above.

As glaring proof of this statement we cite the fact that the associations' outstanding revolving fund certificates were known by the directors to be in excess of the associations net worth. (see minutes of joint meeting of the associations' finance and executive committees. (Exhibit C-125, X. 260) October 20, 1964;

MINUTES OF MEETING

Maryland Virginia Milk
Producers Assn. Inc. Joint Meeting of
Finance and Executive Committees

October 20, 1964

A joint meeting of the Finance and Executive Committees of the Board of Directors washeld at the offices of the Association located at 1530 Wilson Boulevard, Arlington, Virginia, on Tuesday, October 20, 1964.

There were present, Directors: Edward C. Norman, Luther L. Day, Charles C. T. Stull, Merhl

A.Adams, H. Lehman Toms, C. Thomas Sollenberger, Upton F. Gladhill, Paul B. Harlan, Giles H. Miller, Jr., Wm. C. Crossman, Jr. with Mr. Van Metre absent. Also Secretary-Treasurer: James E. Click, Assistant Secretary: Paul H. Snyder, Comptroller: J.W. Marshall, Jr., Tax Attorney: Leonard Silverstein.

Mr. Norman, President of the Association, presided and Mr. Snyder acted as secretary of the meeting which was called to order at 1:30 p.m.

Mr. Click and Mr. Snyder reviewed with the Committees the current status of the Association's Revolving Fund in relation to the outstanding Capital Revolving Fund Certificates, pointing out that certificates outstanding are in excess of the Revolving Fund and the primary reason for the difference is the effect of the discount on the Embassy Dairy note.

Mr. Silverstein suggested to the Committee several ways to make up the deficit as follows:

1) At the time of redemption, certificates would be redeemed at less than 100% of face value.

2) Sell land at the Manufacturing Division at a gain and pay tax on same.

3) Withhold a portion of current year's earnings over a period of 10 or 12 years and pay tax on same.

4) Continue to spread the deficit over all years in the reserve.

5) Book write-up of Class C Stock of Baltimore Bank for Cooperatives and Patronage Dividends of Valley of Virginia Milk Producers now on Association's books at $1.00.

After considerable discussion by the committees, upon motion of Mr. Miller, seconded by Mr. Sollenberger, the next Finance Committee meeting was scheduled for 9:00 a.m. on Friday, November 13, and another joint meeting at the Finance and Executive Committees at 11:00 a.m. on Friday, November 13, *to again consider the matter of the Revolving Fund Certificate over-write and the Association's auditors. Price Waterhouse, be asked to attend if it was felt necessary* *****

Upon motion of Mr. Day, seconded by Mr. Adams, the meeting adjourned at 4:30 p.m.

/s/ Edward C. Norman
President

Paul H. Snyder
Assistant Secretary

This proof becomes more glaring in face of the testimony by Mr. Edward L. Merring, the associations' general counsel, to the effect that Price Waterhouse and Co. were instructed to and did re-audit for the year 1963 and indicated that the accounting procedures used by Wayne Kendrick and Co. were appropriate. Furthermore, counsel for directors and the association *(Messrs. Bittman and Merrigan) objected to the introduction in evidence of the Price Waterhouse reports. (T. 869-891 Volume III of testimony), which are the best evidence of what auditing they did and their findings. The court sustained his objection. The insolvency indicated by this disclosure* of net worth being less than the certificates outstanding against it *is still not disclosed in the members or the bookkeeping technique employed to deal with the matter.* (Emphasis supplied)

> In *Mills v. Mutual B.&L. Assn'n.,* 216 N.C. 664, 6 S.E.2d. 549; *Unemployment Compensation Comm. v. City Ice & Coal Co.,* 216 N.C. 6, 3 S.E.2d 290; *Fisher et al. v. Southern Loan & Trust Co.,* 138 N.C. 224, 50 S.E. 659." (Emphasis supplied) It was held that:
>
> "Trustees may not cover up their machinations by the use of corporate forms or camaouflage of any kind. The arm of equity is neither short nor palsied when it comes to dealing with fraud; nor is judicial process or privilege intended to be used as a shield against , ferreting it out or to stay the day of reckoning and judgment, but rather to be employed, as contemplated in a single action for investigation of the whole scheme and the unravelling of its ramifications. *Equity regards substance not form, and corporate identity offers no bar to its pursuit of the plumbline" of right dealing and fair accounting.* Amos 7:8.
>
> *The right to inform the members of these disclosures was denied by the Courts injunction. Petitioners motion to modify was denied* (See page 98 of supplement)

The farms of this country are the backbone of the economy of the country. Farmers as a class however, and, especially milk producers, are entirely vulnerable and are subject to secret and unconscionable price fixing by the purchasers of farm products. They must be protected not only from price fixing of purchasers of their products from chicanery in their Cooperative Associations. Farmers as a class, and especially milk producers, have little or no bargaining powers.

There can be no comparison between stockholders of a Stock Corporation and members of such a Farm Cooperative as the respondent Association. If a stockholder is dissatisfied and suspicious of the management of his Corporation, he may bring suit, but he also is at complete liberty to sell his stock. A member of a milk producers Association has no such alternatives. It is true, he may withdraw from the Association and sell his milk to commercial dairies, but it was to guard against such commercial dairies that Farm Cooperatives were formed in the first place.

The courts only citation in support of its ruling is Scott on Trusts, Volume 5, Sec. 495, page 3354 which does not apply.

We submit that this section deals with Constructive Trusts distinguished from Express and Resulting Trusts. As pointed out in Section 495, a Constructive Trust is "Where a person in a fiduciary relation *acquires or retains* property in violation of his duty as a 'fiduciary". In the subject case, the Association did not acquire or retain the property of its members in violation of any duty. The property of the members of the Association was turned over to the Association to be handled by the Association as their Trustee. This is an Express Trust as stated by Scott on Trusts, Section 462.1:

> "An express trust is a fiduciary relationship with respect to property, arising as a result of a manifestation of an intention to create it and

> subjecting the person in whom the title is vested to equitable duties to deal with it for the benefit of others . . . A constructive trust bears much the same relation to an express trust that a quasi-contractual obligation bears to a contract. In the case of a constructive trust, as in the case of quasi contract, an obligation is imposed not because of the intention of the parties, but in order to prevent unjust enrichment."

In dealing further with Express Trust, in Volume 1, p. 35, paragraph 2:1; Scott states:

> "In the case of an express trust, however, the duty to deal with the property arises as a result of a manifestation of an intention to impose such a duty, and the Court in enforcing the duty is giving effect to that intention."

It is respectfully submitted that under the above, the members of the Association in delivering their milk to the Association and the Association in accepting it, processing it, and selling it for its members, an express trust was created and that the Association and its Directors are subject to all of the laws governing trustees and cestui que trust. It is further respectfully submitted that the Court below committed serious error in ruling otherwise.

THE EQUITIES

The equities alone, in this case would demand that the respondent association be ordered to give a true accounting to its members, (beneficiaries), in keeping with the standard of care required of a trustee and the case remanded back for retrial.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

FRANK P. PARISH and

THEODORE F. PARISH,

Thorndale Farms,
Taneytown, Maryland.

Petitioners in Proper Person

250 Md. 24
FRANK P. PARISH et al.
v.
MARYLAND AND VIRGINIA MILK PRODUCERS
ASSOCIATION, INC., et al.
No. 103
Court of Appeals of Maryland
May 27, 1968

OPINION OF THE COURT OF APPEALS,

242 A. 2d 512 (1968)
(242 Atlantic Reporter, 2d Series)

Derivative action brought by eight members of milk producers farm cooperative against cooperative and its directors, former directors and certain employees. The Circuit Court for Montgomery County, James H. Pugh, J., dismissed the complaint and the plaintiff members appealed. The Court of Appeals, Barnes, J., held, inter alia, that directors' sale of assets of dairy owned by cooperative for $1,750,000 less than cost to corporation without assets and without security and wi[illegible]ut payments of any cash was, prima facie, gross negligence or culpable mismanagement on part of directors involved.

Reversed and remanded with directions.

Hammond, C. J., dissented in part.

1. Agriculture 6

Members' complaint in derivative action was sufficient to state cause of action for actionable fraud, waste of corporate assets, gross negligence or culpable mismanagement on part of directors of milk producers farm cooperative. Code 1957, art. 23, §§ 349-377.

2. Equity 239

In ruling on demurrer to bill of complaint, truth of all material relevant facts properly alleged together with inferences which may reasonably be drawn from those facts, is admitted. Maryland Rules, Rule 301 b.

3. Fraud 16

Actionable fraud may result from concealment of material facts as well as from false statement of material facts.

4. Fraud 41

It is not necessary to charge defendant specifically with "fraud" or with "acting fraudulently" if facts alleged indicate fraud or are such that fraud is necessarily implied from alleged facts.

5. Fraud 41

Fraud is well pleaded even though conduct alleged is not expressly stated to be "fraudulent", provided alleged facts would constitute fraud in themselves or are facts which necessarily imply fraud.

6. Fraud 43

Allegations in members' complaint in derivative action that there was fraudulent concealment by certain of defendant directors of milk producers farm cooperative and that collectively directors had fraudulently concealed and conspired among themselves to conceal causes of action of the cooperative specifically charged fraud.

7. Corporations 316(1)

Officers and directors of a corporation stand in sufficiently confidential relation to corporation's stockholders to impose duty upon officers and directors to reveal all facts material to corporate transactions.

8. Corporations 393

Courts generally will not interfere with internal management of corporation at request of minority stockholder or a member.

9. Corporations 310(1)

Conduct of corporation's affairs are placed in hands of board of directors and if majority of board properly exercised its business judgment, directors are not ordinarily liable.

10. Corporations 312(1)

Generally, directors of corporation will be held liable if they permit funds of corporation or corporate property to be lost or wasted by their gross or culpable negligence.

11. Agriculture 6

Failure of board of directors of milk producers farm cooperative to investigate two employees' conflicts of interests after actual knowledge that they were faithless employees was prima facie gross negligence and culpable mismanagement for which directors were liable for resulting losses to the cooperative. Code 1957, art. 23, §§ 349-377.

12. Corporations 310(1)

Ultimate determination that there has been violation of antitrust laws of the United States by corporation does not, per se, result in finding of gross negligence or culpable mismanagement on parts of directors of corporation. Code 1957, art. 16, § 101; art. 23, § 95(a); Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; Clayton Act, § 1 et seq., 15 U.S.C.A. § 12 et seq.

13. Agriculture 6

Where possible exemption of farm cooperative from operation of United States Anti-Trust laws was doubtful, directors' purchase of dairy at price in excess of actual and intrinsic value of the property and expenditure of further amounts without first obtaining clearance from department of justice with regard to antitrust laws was, prima facie, act of gross negligence and culpable mismanagement. Code 1957, art. 16, § 101; art. 23, § 95(a); Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; Clayton Act, § 1 et seq., 15 U.S.C.A, § 12 et seq.

14. Agriculture 6

Directors' sale of assets of dairy owned by cooperative for $1,750,000 less than cost to corporation without assets and without security and without payment of any cash was, prima facie, gross negligence or culpable mismanagement on part of directors involved. Code 1957, art. 23, §§ 349-377.

15. Corporations 205

Ordinarily, courts will not entertain derivative suit by stockholder on behalf of corporation until it appears that intracorporate remedies have been unsuccessfully pursued by complaining stockholder.

16. Corporations 206(2)

Generally, complaining stockholder must make demand upon corporation itself to commence action and show that this demand had been refused or ignored before stockholder could bring derivative action.

17. Corporations 206(4)

Demand by stockholder that corporation bring action is not required as prerequisite to bringing of derivative suit when demand would be futile.

18. Corporations 206(2, 4)

Before stockholder may sue corporation to enforce and protect its rights or redress wrongs to it, he must make earnest and unsuccessful effort to obtain remedial action by corporation itself, first by application to directors and then by application to body of stockholders, but he need not do so where circumstances are such that application would be futile.

19. Agriculture 6

Where members' complaint in derivative action against directors of milk producers farm cooperative stated prima facie causes of action against directors for acts of fraud, concealment, illegality, gross negligence, waste of corporate assets and conspiracy to conceal losses and causes of action and it would be futile for members to make demand upon directors to cause cooperative to sue directors to recover for directors' wrongful injuries to cooperative, members were excused from usual requirement that they make prior demand upon directors as condition precedent to maintaining derivative action.

20. Corporations 321

Where complaint in derivative action stated causes of action against directors for acts of fraud, concealment, gross negligence and waste of corporate assets, trial court would not permit directors to conduct litigation against themselves even if they were willing to do so.

21. Agriculture 6

Where majority of directors of milk producers farm cooperative were defendants charged, prima facie, with wrongful conduct for which cooperative would sue and directors were in control of cooperative, minority members were excused from making prior demand upon members of cooperative before instituting derivative suit.

22. Agriculture 6

Directors' unlawful refusal to furnish plaintiff members with list of farm cooperative's membership was sufficient to excuse minority members from making prior demand upon general membership before instituting derivative suit.

23. Corporations 317(6)

A majority of membership of corporation cannot ratify fraudulent action of directors.

24. Corporations 206(2)

Requirements of application to general body of stockholders to bring action before minority stockholders bring derivative action is not absolute and will readily give way in interest of justice.

25. Corporations 206(4)

A stockholder need not seek action by stockholders as a body, where under facts he cannot do so or it would be unreasonable or useless to require it as prerequisite to bringing of derivative suit..

26. Corporations 320(5)

If a stockholder's derivative action is based upon alleged wrong committed by directors against corporation, of such nature as to be beyond revocation by a majority of stockholders, as in case of fraud, it is not necessary to make demand upon stockholders before bringing the action.

27. Mandamus 16(1)

Directors of corporation cannot be permitted to control litigation by corporation against directors so that issuance of writ of mandamus would be ineffectual.

28. Mandamus 16(1)

Writ of mandamus will not be issued where it would be unavailing and nugatory.

29. Corporations 181(1)

Statute providing for inspection by stockholder of certain corporate records and inspection of corporation's books of account and stockholder lists by holders of 5% of capital stock is not applicable to a membership corporation. Code 1957, art. 23, § 132(b).

30. Corporations 181(1)

At common law, stockholder of stock corporation, as well as member of membership corporation, had right to inspect corporate records, provided there was proper purpose for the inspection.

31. Mandamus 167

Burden was upon stockholders or members of corporation to allege and prove proper purpose for inspection of corporate records in mandamus action to compel corporate officials to permit desired inspection.

32. Agriculture 6

When attorney retained by farm cooperative to investigate transactions by its directors and employees submitted his report to the client the report lost its confidential character and cooperative was not entitled to withhold report from its members on ground that it was confidential.

33. Witnesses 217

There can be no confidential nature of an attorney's report to his client so far as the client is concerned for the confidence restricts disclosure by the attorney without client's consent; it does not restrict the client.

34. Agriculture 6

Limitation of Actions 104(1)

Where directors of milk producers farm cooperative were alleged to have fraudulently concealed causes of action for gross negligence and mismanagement and members did not discover existence of causes of action until late 1963 and derivative action was filed in 1965, claims against directors which arose more than three years prior to time suit was filed were not time barred by limitations or by laches. Code 1957, art. 57, §§ 1, 14.

35. Agriculture 6

Where defendant directors of milk producers farm cooperative suffered no prejudice nor disadvantage by members' delay in filing suit, and directors were alleged to have fraudulently concealed causes of action, doctrine of laches did not apply regardless of passage of more than statutory period or of unreasonable time. Code 1957, art. 57, §§ 1, 14.

36. Equity 415

Rule of procedure providing that where more than one claim for relief is presented in an action the court may direct entry of final judgment upon one or more but less than all of claims only upon express determination that there is no just reason for delay and upon express direction for entry of judgment and in absence of such determination any order which adjudicates less than all claims does not terminate the action is applicable to suits in equity as well as to actions at law. Maryland Rules, Rules 345 e, 373 d, 605 a.

37. Judgment 572(2)

Where members' complaint in derivative action contained multiple claims against officers and directors, one demurrer was sustained without leave to amend did not contain express determination that there was no just occasion for delay and no express direction to enter judgment for costs and remaining demurrers were sustained without indication that complaint could be amended, orders did not terminate any of claims and rulings or demurrer did not bar the claims under doctrine of res judicata. Maryland Rules, Rules 345 e, 373 d, 605 a.

38. Agriculture 6

Record in members' derivative action against directors of milk producers farm cooperative did not establish that the sale by certain plaintiff members of their cowherd cost members their standing to participate as plaintiffs on ground that their membership terminated.

39. Husband and Wife 14(2)

Joint Tenancy 1

Joint owners and tenants by the entireties hold per my et per tout.

40. Agriculture 6

Change of individual ownership of farm to joint ownership did not deprive right of joint owner to maintain derivative suit on part of milk producers farm cooperative for wrongful acts arising after joint owner had acquired individual membership.

41. Release 38

Ordinarily a defense based upon a release is complete.

42.. Release 25

A "release" is a contract and may be set aside for the same reason for which any other contract may be avoided.

See publication Words and Phrases for other judicial constructions and definitions.

43. Release 17

If release is obtained by fraud, it may be set aside.

44. Release 17

When release is challenged, a party to it who stands in confidential relationship to other party has burden of showing that release was not obtained by fraud, undue influence or overreaching.

45. Release 58(3)

Whether general release given by milk producers farm cooperative to certain employees was obtained by employees' fraud, undue influence or overreaching was question for trier of fact in members' derivative action.

46. Release 19

A general release of a person standing in a fiduciary relation to a corporation does not release such a person even though the official relationship of that person to corporation has terminated a substantial time prior to execution of release for there must be a full and frank disclosure by the fiduciary in order to sustain effectiveness of the release.

47. Agriculture 6

General manager of milk producers farm cooperative and the manager of one of its plants stood in confidential relationship to farm cooperative and had burden of proving that general release given them by cooperative after termination of their respective employment was not obtained by fraud, undue influence or overreaching.

48. Equity 150(1)

Where transactions which involved former employee of milk producers farm cooperative had some connection with other transactions alleged against cooperative's director and the director and former employee stood in confidential relationship with board and with cooperative and all of claims could be conveniently disposed of in same proceeding, employee could not successfully contend that complaint was multifarious as to him. Maryland Rules, Rules 283, 313 d.

Charles Norman Shaffer, Rockville, and Herbert M. Brune, Baltimore (Brune, Robertson & Iglehart, Baltimore, on the brief), for Wayne E. Lenn et al., part of appellants and by Frank P. Parish, in proper. (Theodore F. Parish [Mrs. Frank P. Parish], both of Taneytown, on the brief), for Frank P. Parish and Theodore F. Parish, other appellants.

Francis D. Murnaghan, Jr., Baltimore, Md. (Paul S. Sarbanes, Baltimore, James R. Miller, Jr., Rockville, and

Edward L. Merrigan, Washington, D.C., on the brief), for Maryland and Virginia Milk Producers Assn., Inc., part of appellees; by Stedman Prescott, Jr., Silver Spring (Jacob M. Berkson, Hagerstown, and Charles W. Prettyman, Rockville, on the brief), for William I. King et al., other appellees; and by M. Peter Moser, Baltimore (Berryl A. Speert, Baltimore, and Charles D. Sanger, Jr., Silver Spring on the brief), for Robert M. Goldman et al., Ex'rs of Estate of Arthur V. Robinson, other appellees.

Before HAMMOND, C. J., and BARNES, McWILLIAMS, FINAN and SINGLEY, JJ.

BARNES, Judge.

This appeal involves the question of whether the third amended bill of complaint, filed by eight plaintiffs, members of the Maryland and Virginia Milk Producers Association, Inc. (the Association), in the Circuit Court for Montgomery County, in equity, against the Association and thirty-four individual defendants, stated a cause of action in equity. The Circuit Court (Pugh, J.) held that it did not and sustained demurrers to it without leave to amend. From the order dismissing the complaint and requiring the plaintiffs to pay the costs entered by the Circuit Court on March 29, 1967, the present appeal to this Court was timely taken by six of the eight plaintiffs. We have concluded that the Chancellor was in error in sustaining the demurrers. We will reverse the order of March 29, 1967, and remand the case for further proceedings.

The original bill of complaint was filed February 4, 1965, by Frank P. Parish and Theodore F. Parish, his wife (Parish), who together owned a single membership in the Association, as a derivative suit against the Association, its directors, its auditor and two of its former employees. On April 9, 1965, the Circuit Court granted leave to six other members of the Association to intervene as parties plaintiff (four of those intervening plaintiffs and the two original plaintiffs are appellants in the present appeal), and, on the same day, granted leave to file an amended bill of complaint. The amended bill of complaint was filed the same day. On July 20, 1965, the Circuit Court (Shook, J.) sustained demurrers to the amended bill of complaint and on July 23, 1965, a second amended bill of complaint with one exhibit was filed. Demurrers were filed to this bill and after hearings before the Circuit Court (Shook, J.) some of the demurrers were sustained as to certain paragraphs and, intoto, as to certain parties. There were numerous proceedings thereafter, including extensions of time to answer, motions for separate trials, motions for taking depositions, a motion of the Parish plaintiffs to represent themselves, a motion for summary judgment, to protect witnesses and the like, all of which are of little importance to the present appeal (with one exception in regard to the argument of some of the appellees in regard to *res judicata*), as the Circuit Court (Pugh, J.), on February 13, 1967, passed an order dismissing all motions, demurrers and then permitted the filing of a third amended bill of complaint. The third amended bill of complaint (the complaint), with a number of exhibits, was duly filed on February 28, 1967, and, as we have indicated, it is from the Chancellor's order sustaining the demurrers to the complaint, dismissing it and requiring the plaintiffs to pay the costs, that the present appeal was taken.

The complaint, with its eight exhibits, is a rather formidable document. In the record, it consists of 39 legal-size papers with 53 pages of exhibits, a total of 92 pages; in the record extract the complaint consists of 41 printed pages with 36 printed pages of exhibits to which the Association has added 7 pages in the appendix to its brief, a total of 43 exhibit printed pages, or a total of 84 printed pages for both complaint and its exhibits. Although both the appellants and the appellees have in both their briefs and in their arguments occasionally considered material not in the complaint and its exhibits, it is clear that we are confined to the allegations in the complaint and its exhibits and reasonable inferences from those allegations in considerting the propriety of the sustaining of the demurrers by the Chancellor. Standard Founders v. Oliver, 168 Md. 317, 345-346, 178 A. 223, 235 (1935). We will confine ourselves to those allegations and reasonable inferences.

The first five paragraphs of the complaint designate the parties, both plaintiff and defendant. Paragraph 1 describes the plaintiffs as follows:

(a) The plaintiffs, Parish, are together members of the Association and residents of Maryland. Their farm, "Thorndale Farm" which they have owned continuously since prior to 1953, sold milk to the Association as a member since 1952 until the spring of 1966 under two contracts with the Association—one in the name of Mrs. Parish dated November 18, 1942 and the other in both names dated October 9, 1961. The contracts are attached as exhibits A and B as a part of the complaint. Mrs. Parish, in 1941, was enrolled as a member and operated the farm as a member until 1957. In accordance with the terms of the original contract, exhibit A, and the subsequent contract, exhibit B, the farm was operated from 1957 to 1961 in the name of Schott Brothers, but the leasing arrangement did not terminate the Parish membership in view of the provisions of Article VIII of the Association's Certificate of Incorporation, exhibit C, filed as part of the complaint. In 1961, the Schott Brothers lease was terminated and Parish executed the October 9, 1961 contract with the Association (exhibit B) and Parish continued to operate the farm from 1961 until a bona fide sale of their cowherd in the spring of 1966.

(b) The plaintiffs, Wayne E. Lenn and Edwin R. Lenn, trading as "Lenn Brothers," have been continuously members of the Association since 1952, and reside at Route 2, Culpeper, Virginia.

(c) The plaintiff, J. A. Bernard Dahlgren, trading as "Windsor Lodge Farm," has been continuously a member of the Association since 1959 and resides at Huntley, Virginia.

(d) The plaintiff, E. Irving Eldridge, has continuously, since 1955, been a member of the Association and resides at The Plains, Virginia.

(e) The plaintiff, Edward. M. Wharff, Jr., has continuously, since 1959, been a member of the Association and resides at Woodbine, Maryland.

(f) The plaintiff, B. G. Wenger, Jr., has continuously, since 1950, been a member of the Association and resides at Woodstock, Virginia.

It is then alleged that the original complaint in the case was filed by the Parish plaintiffs on behalf of themselves and all other members of the Association similarly situated and that subsequently the other plaintiffs, above named, having received permission of the Circuit Court, intervened as plaintiffs and adopted the allegations of the Parish complaint.

Paragraph 2 describes the defendant Association. It is a Maryland corporation created and functioning as a "farm cooperative" under Code (1957), Article 23, Sections 349 to 377. A copy of the Certificate of Incorporation, amended to date, was filed as part of the complaint as exhibit C. Under Article VII and VIII of the Articles of Incorporation "the Association has the character of an incorporated trust, it acting as consignee of the members' milk-produce and as their agent 'to handle * * * process, store, finance, haul, transport, advertise, grade, standardize, market, distribute and do any of the foregoing things * * * [the] milk-produced by its members and products and by-products derived therefrom * * *.' " The Association has a statutory principal office in Frederick County, Maryland. It is regularly doing business in Montgomery County and in many other counties of Maryland

and is also doing business in Virginia, the District of Columbia and elsewhere in the United States.

Paragraph 3 describes the defendants William B. Hooper (Hooper) and Arthur V. Robinson (Robinson) as the principal managing and operating officers of the Association during the period of 1955 (approximately) to 1963. Hooper, who was secretary-treasurer-general manager of the Association, resides in Virginia and is engaged in business in the District of Columbia. Robinson, who was named as a defendant in the original bill of complaint and who was manager of the milk processing plant at Laurel, Maryland, and a resident there, died on September 20, 1965. His executors, Robert M. Goldman and J. Robert Sherwood, were on a proper motion substituted as parties defendant in Robinson's place.

Paragraph 4 describes the defendant directors of the Association. In view of the arguments of some of the director defendants, it will be necessary to set out the allegations of paragraph 4 in some detail. It alleges that all but three of the defendants listed below are present directors of the Association. These three are Charles C. T. Stull, Lester W. Huff and Dr. Oscar S. Martin. The year in parenthesis opposite each name indicates the year when each director became a member of the board of directors in accordance with the plaintiff's knowledge and belief:

"Directors Resident in Maryland
Merhl A. Adams (1962)
Harry W. T. Fouche (1963)
Upton F. Gladhill (1953 or earlier)
Paul B. Harlan (1953 or earlier)
William I. King (1963)
Walter A. Martz (1964)
J. Homer Remsberg (1953 or earlier)
Charles C. T. Stull (1962) (Terminated end of 1964)
H. Lehman Toms (1959)
David Weitzer (1964)

Directors Resident in Virginia
- William H. Cockerill (1962)
- William C. Crossman, Jr. (1956)
- Luther L. Day (1962)
- Lester W. Huff (1957) (Terminated October 9, 1964)
- Dr. Oscar S. Martin (1957) (Terminated early 1965)
- Giles H. Miller, Jr. (1956)
- Edward C. Norman (1951)
- W. W. Sanford, Jr. (1963)
- C. T. Sollenberger (1963)
- Alton A. White (1956)

Director Resident in West Virginia
- I. D. Van Metre, Jr. (1953 or earlier).

Said defendants have held the following executive offices in the Association:

J. Homer Remsberg, president from 1953 to 1964
Edward C. Norman, first vice-president 1963 and president 1964
I. D. Van Metre, Jr., first vice-president 1964
Upton F. Gladhill, second vice-president 1962 to 1964
Charles C. T. Stull, second vice-president 1964

The principal policy-making committees of the Board of Directors with respect to matters herein complained of are the Executive Committee, Plant Committee and the Finance Committee. The defendants listed below are or have been members of the following committees at times during the matters herein complained of:

Executive Committee
- Merhl A. Adams
- Upton F. Gladhill
- Charles C. T. Stull
- Luther L. Day
- William C. Crossman, Jr.
- Giles H. Miller, Jr.

Plant Committee
- Upton F. Gladhill
- Edward C. Norman
- Giles H. Miller, Jr.
- W. J. Hahn
- Paul B. Harlan
- J. Emory Kirkpatrick
- Howard W. Clark
- Alton A. White
- William C. Crossman, Jr.
- Lester W. Huff
- J. Homer Remsberg
- I. D. Van Metre
- Luther L. Day
- William I. King
- William H. Cockerill
- Merhl A. Adams
- J. F. Potts

Finance Committee
- Upton F. Gladhill
- Edward C. Norman
- Paul B. Harlan
- Giles H. Miller, Jr.

The following defendants who are former directors served on the Executive Committee or the Finance Committee at times during the matters herein complained of:

Executive Committee
- Edwin D. Fry (1954 to 1960)
- Paul R. Marsh (1954 to 1960)
- M. H. Ramsburg* (1954 to 1961)
- (*on information and belief, this defendant is now deceased)
- Jennings F. Potts (1956 to 1961)
- Howard W. Clark (1960 to 1962)
- J. Emory Kirkpatrick (1962)

Finance Committee
G. W. Carper (1954–1955)
W. J. Hahn (1954–1963)
Basil Mobley* (1954 to 1961)
(*was second Vice President from 1953 or earlier to 1961)."

Paragraph 5 describes the defendant Wayne Kendrick (Kendrick) as a certified public accountant practicing in the District of Columbia where, on information and belief, he is a resident. He or the firm of "Wayne Kendrick & Company," of which he is a partner, prepared and issued all of the audited financial statements of the Association during the period 1955 to the present time. The references in the complaint to the "defendants" do not include Kendrick unless otherwise indicated.

We now come to paragraph 6 of the complaint which sets out its objects and purposes in three parts, the first part being subdivided into 12 sub-parts. These objects and purposes are so set forth:

FIRST. (1) a series of acts which the plaintiffs charge "constitute waste, illegality, gross negligence, culpable mismanagement of the affairs of the Association and breach of trust and fiduciary duty by the individual defendants who constituted its officers and directors at the times when the respective acts took place and who are hereinafter specified in subsequent paragraphs of this Amended Complaint;"

(2) acts of self-dealing by certain defendants "hereinafter specified" to their profit and to the substantial injury of the Association;

(3) the issuance of incorrect, misleading and contradictory reports and financial statements to the members of the Association by the defendants "who are hereinafter specified as officers and directors" including a false and misleading

report adopted at the Association's Annual Meeting on February 24, 1964, on the acquisition, operation and sale of the Embassy Dairy. Page 17 of this false and misleading report is filed as part of the complaint as exhibit D, and, upon information and belief, shows in the handwriting of Sollenberger, one of the directors, the falsity of some of the reported information;

(4) serious infractions of the anti-trust laws of the United States by the defendants who were officers and directors of the Association and caused it to purchase a dairy in violation of those laws and was thereafter ordered by the United States District Court for the District of Columbia to divest itself of that dairy business;

(5) upon information and belief, the continued sale of fluid milk to Embassy Dairy at Class 2 price after the sale of that dairy pursuant to the District Court's order;

(6) the then officers and directors causing the Association to make an improvident sale of the dairy with no down payment being obtained, except out of cash transferred by the Association to the purchaser as cash assets of the business sold;

(7) the then officers and directors falsely reporting to the membership that a capital gain of $450,000 was realized on the sale of the dairy when in fact it was made at a loss;

(8) the then officers and directors causing the Association to reduce the price by allowing the purchaser a "discount" of $500,000 without informing the membership with respect to it in the text of the next annual report or in the operating statement;

(9) the then officers and directors continuing the manager of the dairy business on the Association's payroll after the sale of the dairy and attempting to retain such control or

influence over its operation as to frustrate the purposes of the divestment order of the District Court and expose the Association to heavy penalties for the violation of that order;

(10) the then officers and directors making improvident so-called settlements with Hooper and Robinson by which clear liabilities of approximately $250,000 or more, for profits illegally diverted by them from the Association to their own private competing business, and other liabilities in an even greater amount, were purportedly released for a grossly inadequate consideration;

(11) the then officers and directors causing the Association to purchase such private competing business from Hooper and Robinson for "an excessive price after being advised of such derelictions and conspiring among themselves and with others to withhold vital information relating to these matters from the members of the Association from the time of these transactions to date;"

(12) "upon information and belief other acts of fraud upon the membership by the officers and directors and breach of their fiduciary duties, the details of which remain at this time undisclosed to the membership but contained in the Dugan Report." In connection with the conspiracy charged in subparagraph (1), supra, it is the object and purpose of the complaint to set forth those actions of the officers, directors and others who have "combined, conspired and confederated among themselves and with each other to conceal and withhold from the members the information relating to the foregoing alleged transactions by various obstructive strategems including but not limited to the following:" (a) the refusal of Edward L. Merrigan, an agent of the then officers and directors, to furnish a list of the members of the Association to the plaintiff, Frank Parish, in March, 1964; (b) their subsequent refusal to furnish such a list as set forth in a letter from Merrigan, general counsel for the Association, in his letter of August 18, 1964, a copy of which is filed as part

of the complaint as exhibit E; (c) the refusal of the then officers and directors adequately to inform the membership of the facts surrounding the operation, disposition and sale of the Embassy Dairy pursuant to a members' resolution adopted at the annual meeting of members held on February 24, 1964; (d) the refusal by the officers and directors and of their agent, Merrigan, at the annual meeting of members held on February 22, 1965, and their subsequent and continued refusal to furnish any requesting members the opportunity to examine or have a copy of the Dugan Report which outlines the results of an investigation conducted at the expense of the Association by Frank Dugan and which, upon information, reports the evidence and constitutes an admission by the Association of many of the allegations in the complaint; (e) "an illegal attempt by the Board of Directors through By-Law Amendment on March 30, 1966, to impose restrictions upon future derivative suits brought by members requiring: (1) an application to the Board of Directors and [if] authority for the suit is refused and (2) a majority vote of all members attending an annual or special meeting–all contrary to the laws of the State of Maryland."

SECOND, the plaintiffs charge that they are entitled to require an accounting by the individual defendants to the Association "for the great losses and damage suffered it as a result of said culpable acts."

THIRD, the plaintiffs charge that they are entitled to request such further judicial action as may permit the Association to recover its losses from those defendants who are beyond the court's jurisdiction and obtain such other relief as may be appropriate.

For the specification as to the charges and as to the particular defendants responsible for them in each instance, reference is made to the subsequent paragraphs of the complaint.

In paragraph 7, the plaintiffs set forth why they are not required as a condition of bringing suit to apply to the Board of Directors of the Association (the Board), or to the members, for relief, as follows:

(a) The Board consisted of the defendants and the application to the defendants as directors for relief of the matters alleged in the complaint "would be unavailing, fruitless and futile," and such application is "not required as a condition of bring this suit." This is further elaborated by alleging that 21 of the directors at the time when the original bill of complaint was filed are listed in paragraph 4 of the complaint and are all named as defendants. Nineteen of these directors were members of the Board during the year 1964 when the Board:

(1) approved the improvident settlements with Hooper and Robinson as alleged in paragraphs 19 and 20;

(2) employed Professor Frank Dugan at the Association's expense to investigate and report the wrongful acts already alleged in the complaint, obtained the Dugan Report and then determined to refuse members of the Association access to it although the president of the Association had promised that the Dugan Report would be made available;

(3) as alleged in paragraphs 21 and 24 of the complaint, concealed and conspired to conceal from members of the Association vital information as to operations and particularly facts establishing the causes of action against various defendants which are described in the complaint.

It was further alleged that the complaint charges that members of the Board during the year 1964, who have been named as defendants, should be required personally and individually to account to the Association for the losses it suffered as a result of these acts. A majority of the present Board have been members of the Board since 1959 and are alleged in the complaint to be responsible to account to the Association for losses suffered by it during the past six years. It is then alleged:

> "It is therefore apparent both from the nature of the Complaint and the relief sought against the directors that to request them as a board to institute a suit against themselves for an accounting, or if such a suit were instituted in the name of the Association, to prosecute it vigorously and impartially would be futile. Complainants are therefore advised and aver that they have the right to maintain the present representative suit to establish the Association's right to an accounting against these directors and the other defendants without first requesting the defendant directors to institute such a suit in the name of the Association."

It is further alleged that Frank Parish has repeatedly sought access to the Association's membership list for the purpose of informing the members of the matters alleged in the complaint and, as can be seen from the summary of correspondence between Frank Parish, or his attorney, and the Association contained in the letter of its general counsel dated August 18, 1964, (exhibit E), the directors have consistently refused to permit his bring the matters to the attention of (1) 10% of the members (approximately 2200 in number) for filing a petition with the directors requiring a call of a special meeting of members under Code (1957), Article 23, Section 361, and (2) the general membership attending such a specially convened meeting.

The plaintiffs alleged that if it be assumed, *arguendo*, that they might otherwise be expected to request the members to direct the institution of suit by the Association before doing so themselves (which the plaintiffs deny is a correct view of the law), they are relieved from making such a request by the action of the directors (listed in paragraph 4 of the complaint) in preventing the plaintiffs from making an appeal to members, by refusing to release the membership list for that purpose and by refusing to release the Dugan Report as a particularized statement of many of the wrongs complained of in the complaint.

It is further alleged that the plaintiffs have stated the wrongful acts of the members of the Board in as much detail as they are able to do without the Dugan Report, the minute books of the Board and the statement of charges against Hooper, the general manager, by James E. Click, assistant secretary, when Mr. Click submitted his resignation to the Board, all of which precipitated the resolution of the Board on November 8, 1963, to conduct a fact finding study, subsequently delegated on November 22, 1963, to the plant committee, which thereafter retained Frank J. Dugan to develope the pertinent facts relating to the Click charges. Professor Dugan took the testimony of 19 witnesses covering 1467 transcipt pages, and wrote a 75 page report to the directors, all of which facts are referred to in exhibit G, and none of which information has been made available to the plaintiffs although it is in the hands of the defendants. It is then alleged:

> "It is therefore impossible for these complainants at this time to specify, with any greater particularity then herein appears, which of the defendants voted in favor of or otherwise assumed responsibility for the particular wrongful acts of which they complain. With the aid of discovery procedures in this litigation complainants will be able to bring fully to the attention of this Court the actual facts as to the participation of each individual director-defendants in the acts complained of."

It is further alleged that the Circuit Court had jurisdiction and that venue is properly laid in the Circuit Court for the independent reasons:

(1) the Association is regularly doing business in Montgomery County within the meaning of Code (1957), Article 23, Section 95 (a), and

(2) apart from the doing business by the Association in Montgomery County, four individual co-defendants reside in the County and by the provisions of the Code (1957), Article 16, Section 101, the Circuit Court is empowered to adjudicate the plaintiffs' complaint against all defendants who are residents or corporations of the State of Maryland.

We now turn to the paragraphs in the complaint which allege the facts in regard to various transactions already mentioned and alleged in the complaint.

Paragraphs 8 to 15 allege the facts in regard to the Embassy Dairy. In paragraph 8 it is alleged that on or about August 1, 1954, by the action of its directors, a majority of whom (later listed) are defendants in the present suit, the Association purchased the Embassy Dairy in the District of Columbia in violation of the Sherman and Clayton Anti-Trust Acts. It is alleged that according to the judicial findings in the civil anti-trust suit brought by the United States the motives of the transaction were to "eliminate the largest producers of non-Association milk in the area," and "increase the Association's control of the Washington market," and "the transaction * * * was entered into with the intent and purpose of restraining trade." The Association paid $3,890,000 for Embassy Dairy. In making its findings in regard to motive the United States District Court for the District of Columbia "accepted and relied upon evidence that 'the price paid by the Association was far in excess of the actual and intrinsic value of the property purchased.' "

It was further alleged that the Association asserted unsuccessfully "the colorable defense that it was wholly exempt from control under the anti-trust laws and laws forbidding monopolies." Judgment was entered establishing that the purchase and operation of the Embassy Dairy were in clear violation of law and the District Court ordered the Association to divest itself of the entire dairy property. The Association prosecuted a fruitless appeal to the Supreme Court of the United States at a cost, on information and belief, of more than $300,000 and that Court affirmed and extended the judgment (Maryland and Virginia Milk Producers Ass'n v. United States, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880 (1960)), holding that the District Court wrongfully dismissed an additional charge under Section 2 of the Sherman Anti-Trust Act, stating that "the Association's anti-competitive activities are so far outside the 'legitimate objects' of a cooperative that, if proved, they would constitute clear violations of Section 2 of the Sherman Act by the Association, a fact, indeed, which the Association does not really dispute if it is subject to liability under this section." The District Court issued a final judgment as of June 20, 1960, (subsequently amplified by a consent decree signed November 22, 1960) pursuant to which the Association was required promptly to divest itself of all interest in the Dairy. Action was taken pursuant to the judgment as of January 1, 1961. The defendants who constituted the Board which approved the purchase of the Embassy Dairy in 1954 are deemed to have assented to the Board's action unless absent from the meeting or unless they affirmatively registered their dissent pursuant to Article 23, Section 62(b) of the Maryland Code then in effect. On information and belief, each of the defendants was present and did not register his dissent. The defendants who participated in the action of the Board were: Carper, Fry, Gladhill, Hahn, Harlan, Kirkpatrick, Marsh, Mobley, Norman, Potts, Ramsburg (since deceased, on information and belief) and Remsberg. On information and belief, these actions were particularly investigated and approved by the Association's then president, the defendant Remsberg, by the Executive Committee including the defendants Fry and Marsh and by the Finance Committee including the defendants Carper, Gladhill, Hahn, Mobley and Norman. The duties of the Executive and Finance

Committees appear in Articles XI and XII of the By-laws appearing in exhibit C.

The plaintiffs then alleged that they further charge that:

> "* * * the acquisition of said Dairy was illegal, and without seeking clearnace from the Department of Justice, was an act of reckless mismanagement; and was a proximate cause of substantial and heavy loss and damage to the Association, as hereinafter set forth. Complainants have been denied access to minute books and other records of the Defendant Association and are therefore at this time unable to specify in greater particularity the negligent acts and responsibility of individual defendants with respect to said acquisition."

In paragraph 9 the improvident nature of the Embassy Dairy sale are alleged. It is alleged that in addition to the purchase price of $3,890,000, the Association expended large sums (the amount of which is not specifically ascertained by the plaintiffs without access to books and records denied them) in improvements to the Embassy Dairy between 1954 and 1961. On information and belief, the total adjusted cost basis of the Embassy Dairy as of the time of its sale in 1961 exceeded $5,000,000. By an agreement effective January 1, 1961, a memorandum of which was executed on November 4, 1960, the Association acting by its Board, of which 17 out of the 21 members are named defendants in the suit, sold the Dairy in installments to Metropolitan Food Corporation (Metropolitan), a Virginia Corporation, which, on information and belief, had no substantial assets. A copy of the memorandum of agreement is attached as exhibit F as a part of the complaint. It appears from the memorandum of agreement that the total price for the sale was $3,250,000, plus "cash in banks and on hand" of the Dairy and the amount of its accounts receivable.

The assets sold were to consist of all the assets of the "Embassy Dairy Division", including "the capital stock of the Richfield Dairy Corporation and Simpson Bros., Inc. t/a Wakefield Dairy, the acquisition and cost of which are described" later in paragraph 17, and also included "an amount equal to the cash on hand or in banks as of the date of settlement," and the accounts receivable, so that, apart from the cash and accounts receivable, all of the assets were sold for $3,250,000. The terms of sale were:

(a) The sole cash payment at settlement was "an amount equal to the cash in banks and on hand" so that no cash payment was made by the buyer except to the extent it received cash from the seller at the date of settlement.

(b) A non-interest bearing note for $250,000 was deliverable due in six months.

(c) A non-interest bearing note was to be delivered in the amount of the notes and accounts receivable, but this note was payable only as collections were made and was subject to discounts allowed and for uncollected items, so that this note would require no substantial cash outlay by the buyer.

(d) A note for $3,000,000 due in semi-annual installments beginning two years after the settlement, with the balance of $500,000 due 14 years after settlement. (Exhibit F indicates that this note would bear interest at 5% per annum from the date of settlement).

The notes mentioned were to bear the endorsement of "Irving D. Berger" but "were unsecured, the seller not even retaining a lien on the Dairy assets for payment of the balance of the purchase price." By reason of the above stated terms requiring no down payment beyond the cash turned over to the buyer on the sale, and no security, the sale was wholly improvident and made for an insubstantial consideration." The following named defendants are deemed by reason of Code (1957), Article 23, Sec. 62(b) to have assented to the action of the 21-member Board which approved the terms and the sale: Clark, Crossman, Jr., Gladhill, Hahn, Harlan, Martin, Jr., Miller, Jr., Mobley, Norman, Potts, Ramsburg (now deceased) Remsberg, Toms and White. It is alleged, on information and belief, that these directors were present at the meetings of the Board when the action was taken and did not dissent from the action taken.

It is further alleged, on information and belief, that the sale was particularly considered by the then president, Remsberg, and vice-president, Mobley, by the executive committee, including the defendants Marsh, Potts, Miller and Clark, and, by the finance committee, including the defendants Gladhill, Hahn, Mobley and Norman. The plaintiffs further charge that the approval of these defendants of the sale and its terms "was an act of reckless mismanagement and gross negligence in the discharge of their duties as directors whereby substantial loss and damage has been proximately caused" to the Association.

The plaintiffs further charge that under the terms of sale and due to the clear and certain sources of income from the Dairy business, acquired by the purchaser with no actual investment, the purchaser was reasonably assured of being able to make all future payments under the contract "without providing a single dollar of its own to be paid as consideration for this purported sale, which closely approximated, and was in substance, a gift of corporate assets of substantial value which had cost the Association not less than $5,000,000."

Paragraph 10 alleges the false and misleading statements in regard to the Embassy Dairy sale in the Association's Report for 1960 issued in February, 1961. In this report the following is alleged to appear:

(a) The sale was described as made to "a Washington businessman" and elsewhere as one made to "Irving D.

Berger," and no mention was made of the true identity of the corporate purchaser or those interested in it.

(b) The installment payments were represented to be "adequately secured," whereas they were in fact unsecured, no security whatever being taken as shown by exhibit F.

(c) The sale was described as being at a "capital gain of $450,000" whereas the sale was consummated without profit and in fact at a loss, as shown by exhibit F and by the facts already alleged as to the cost basis for the property.

It is alleged that the directors who approved the sale are the same defendant directors who were responsible for issuing the Annual Report for 1960, early in 1961, except that Marsh was no longer on the Board and Day was then a member of the Board. The plaintiffs charge that the issuance of the false and misleading statements to the members by the directors mentioned "constituted a violation of the fiduciary responsibility of directors to the Association and to its members, and was likewise an act of reckless mismanagement."

Paragraph 11 describes a false statement in regard to the sale of Embassy Dairy in the Annual Report for 1961, issued in early 1962, in which it was stated that there was a "gain on sale of fluid milk division $435,794." The allegations are similar to those in Paragraph 10. The defendant directors alleged to be responsible for this false statement were: Adams, Clark, Cockerill, Day, Gladhill, Hahn, Harlan, Huff, Kirkpatrick, Martin, Miller Jr., Norman, Remsberg, Stull, Toms, Van Metre and White. Remsberg, as president, and Gladhill, as vice-president, are alleged to have particularly considred and approved the 1961 Report as did Clark, Day, Gladhill, Kirkpatrick and Miller of the executive committee and Gladhill, Hahn, Harlan and Norman of the finance committee. The same charges of breach of fiduciary responsibility and of reckless mismanagement are made.

Paragraph 12 alleges the facts and circumstances in regard to the allowance of a $500,000 discount on the Embassy Dairy purchase price in 1963. It is alleged that in 1963, by action of the Board, a discount of $500,000 on the Embassy Dairy purchase price was allowed thereby reducing the ultimate price paid from $3,250,000 to $2,750,000. On information and belief, it is alleged that Metropolitan resold the Embassy Dairy to another corporation, Eastern Food Products Inc. (Eastern), which declined to assume the balance due but offered to pay the balance due, less a discount of $500,000. The Association collected nothing on the endorsement of the $3,000,000 note by "Irving D. Berger," nor did the Association and the defendants pursue the bulk sale remedies available to it on the transfer by Metropolitan of the assets of Embassy ~~Dairy~~ to Eastern which is especially significant since Metropolitan claimed that it was without assets to pay the note to the Association. The directors named as defendants who approved the arrangement were: Adams, Cockerill, Crossman, Jr., Day, Fouche, Gladhill, Hahn, Harlan, Huff, King, Martin, Jr., Miller, Jr., Norman, Remsberg, Sanford, Jr., Sollenberger, Stull, Toms, Van Metre and White. President Remsberg and vice-presidents Norman and Gladhill, as well as Miller, Stull, Day, Crossman and Adams of the executive committee and Gladhill, Hahn, Norman, Harlan and Miller of the finance committee, particularly considered and approved the arrangement. The plaintiffs charge that the action "was grossly negligent and improvident and was an act of reckless mismanagement" resulting in loss to the Association of $500,000 plus future interest payments an, in the alternative, that the loss resulted from two grossly negligent and improvident acts, i.e., (1) approving the terms of sale without cash or security as was done in 1960 by the then Board, listed in Paragraph 9, and (2) approving the discount in 1963. The defendants who assented to both transactions and were members of the Board at both times were: Crossman, Jr., Gladhill, Hahn, Huff, Martin, Jr., Miller, Jr., Norman, Remsberg, Toms and White.

Paragraph 13 alleges the facts in connection with the misleading statement in the 1963 Annual Report of the Association in regard to the Embassy Dairy matter and particularly the $500,000 discount. Not only were the statements in the 1960 and 1961 Annual Reports indicating a gain of $450,000 or $435,795 never corrected in any future operating report (the discount of $500,000 in 1963 would on its face convert the so-called profit into a loss), but the discount was not in any way connected with the Embassy Dairy sale. In the 1963 Annual Report the only item appearing was in the "Statement of Members' Revolving Reserve Fund" appended to the 1963 financial statements as follows: "Discount allowed on Payment of Eastern Food Products, Inc. Note $500,000.00." Eastern Food Products, Inc. was not the purchaser named in the Memorandum of Agreement itself, the 1963 Annual Report made no mention of the transaction in the text and there was no indication in the Report that this was a note given in connection with the so-called sale "to a Washington businessman" of the assets of Embassy Dairy. The directors in office in 1964 and listed in Paragraph 4 are deemed responsible for the misleading statement which is alleged to be an "act of reckless mismanagement" by those defendants.

Paragraphs 14 and 15 allege the relationship of the Embassy Dairy sale to the divestiture orders of the District Court in the anti-trust case. It is alleged that the Agreement of January 1, 1961, was submitted by the Association to the District Court solely for a determination that it complied with the Court's divestiture orders of January 20, 1959, and June 30, 1960, and was approved by the court on November 22, 1960. The agreement was consummated on or about January, 1961, and thereafter the $500,000 "discount" was allowed. The Agreement of January 1, 1961, provided that certain employees would be released by the Association and taken over into the employ of the purchaser, especially naming one "J. R. Parks" to be so transferred. Parks was the operating general manager of the Association for the Dairy and was transferred to become, and became, the general manager of the operation for the purchaser. On information and belief, the plaintiffs allege that the Association continued to pay regular compensation for services and "advice" to Parks and further guaranteed him against loss of his position and salary, thus violating the spirit and intent of the divestiture orders and exceeding the authority given the Association by the order of court approving the sale in that such an arrangement constituted a reservation of power to influence the purchaser's conduct and thereby vitiated the court's requirement of complete divestiture in good faith. This exposed the Association to a charge of contempt of the anti-trust order of the District Court with resulting heavy liabilities by way of penalty. The defendant directors responsible have already been specified in prior paragraphs andthe plaintiffs charge that this violation was "illegal and an act of reckless mismanagement" on the part of the directors responsible.

Paragraph 16, in effect, summarized with respect to the matters set forth in Paragraphs 8 to 15 inclusive the "gross mismanagement, gross negligence and dereliction of duty" of the directors alleged to be responsible, as follows:

(a) Authorizing and approving the Embassy Dairy purchase for $4,890,000 and making extensive additions without prior clearance as to anti-trust matters from the Department of Justice.

(b) Approving the price which was, on information and belief, grossly excessive in view of the finding of the District Court.

(c) In wasting large sums, exceeding $50,000, in fruitless litigation to sustain an indefensible transaction.

(d) In hastily entering into a sale of the Embassy Dairy property on January 1, 1961, with a purchaser of doubtful responsibility, without any actual down payment and on terms which amounted to a gift of corporate assets.

(e) In concealing from members and misrepresenting the true terms and conditions of the sale and even the identity of the purchaser.

(f) In falsely representing that future payments were "adequately secured" when they were unsecured.

(g) In representing that the sale was made at a profit when in fact it was made at a loss.

(h) In wasting $500,000 of members' funds by allowing a "discount to the purchaser or its successor.

(i) In making the misleading statements in regard to the "discount."

(j) In continuing and approving compensation to Parks, thereby exposing the Association to a contempt charge.

Paragraph 17 alleges certain facts in regard to the acquisition of the capital stock of Richfield and Simpson Bros., trading as Wakefield Model Farm Dairy (Wakefield). It is alleged that the price was in excess of $1,000,000 but the exact amount has not been disclosed. The 1958 Annual Report of the Association, however, does disclose that "these companies were facing bankruptcy and unable to pay their milk bill." This stock investment was placed among the assets of Embassy Dairy which was operated as the fluid milk division" of the Association. Complaint was made in the anti-trust litigation of the acquisition of Richfield and Wakefield and, following the decision of the Supreme Court of the United States which sustained the complaint as to these properties also, the consent decree of November 22, 1960, required the Association to divest itself of these assets also. The total investment in the three dairies made in violation of the anti-trust laws, including the purchase prices, improvements and additions exceeded $5,000,000, all of which assets were sold, as above indicated, for no additional consideration, thereby further adding to the loss resulting to the Association from the sale, which loss resulted from gross negligence on the part of the defendant directors already specified in prior paragraphs.

Paragraphs 18, 19, 20 and 21 allege certain facts in regard to Hooper and Robinson, the alleged improvident settlement with them and the suppression of the full Dugan Report.

In Paragraph 18 it is alleged, on information and belief, that the defendants Hooper and Robinson had prior to 1963, in flagrant disregard of their fiduciary responsibilities as trusted agents and officers of the Association and by making use of their official positions and powers, consummated the following acts of personal aggrandizement at the expense of the Association:

(a) Robinson acquired large tracts of agricultural land near Laurel, Maryland and sold it to the Association at a substantial profit, although the land was not needed for Association purposes; the description, amount and cost of the land being unavailable to the plaintiffs but included in the Association's records.

(b) Robinson acquired a milk processing plant near Laurel, known as "Olney Acres Dairy Products Plant" (Olney Acres), which he sold to the Association on December 1, 1955, for $1,000,000, representing a large and unconscionable profit to him. Here again the figures are unavailable to the plaintiffs, but they believe they are included in the Association's files and records.

(c) While Hooper was Secretary-Treasurer and General Manager of the Association and Robinson was manager of the Laurel plant, they acquired or constructed a milk plant in

Florida and, in a short time, diverted over $1,300,000 worth of gross business from the Association's Laurel plant to their Florida plant, the diversions being consummated by mere entries in the books of the Laurel plant, "constituting clear misappropriations of assets of the Association by said Hooper and Robinson."

(d) They purchased milk products from the Association at a low price and sold the product at a high price to customers of the Association.

(e) When they were questioned as to these operations they caused the Association to buy the Florida plant from themselves to buy the Florida plant from themselves at an excessive price after that plant was no longer operating.

(f) Robinson personally went into the business of owning and operating trucks and, by means of his official position, required the products of the Laurel plant to be hauled and delivered in his trucks.

(g) Hooper and Robinson caused the Association to pay certain excess percentage compensation to Robinson aggregating over $130,000 in one year by paying members of the Association too little for their surplus milk and thereby inflating and overstating the profits of the plant so as to result in higher compensation for Robinson under the excess percentage arrangements made by the Association.

(h) They caused the Association to employ inexperienced and incompetent relatives of Hooper and Robinson in positions of trust at the Laurel plant and elsewhere in the employ of the Association.

Paragraph 19 alleges the following:

> "During the year 1964 the then directors of the Association listed in paragraph 4 as defendants,

> having had some or all of these matters brought to their attention, reached a wholly improvident settlement with the defendants Hooper and Robinson by which said defendants resigned or were removed as officers, agents and employees of the Association, but their alleged rights to salary, compensation and severance pay were recognized, notwithstanding the clear forfeiture of all such rights by reason of their conduct; by which said defendants paid the wholly inadequate sum of $95,000,000 out of their gains illegally obtaining from the Association, as well as said alleged rights to compensation aggregating approximately $40,000.00 for a general release from the association. Such settlement was wholly unreasonable and unjustifiable, allowing them to retain hundred of thousands of dollars of gains, profits and benefits illegally taken from the Association. On information and belief such settlement was made by said defendant directors without adequate investigation, without the exercise of due care and indeed in reckless and flagrant disregard of the rights of the Association and its members."

In Paragraph 20, Subparagraph (1), the plaintiffs allege the source of detailed and specific statements in regard to certain of the wrongs committed by Hooper and Robinson in a Special 1964 Report prepared by the Association in the summer of 1964 for the purpose of oral presentation to regional meetings of the Association. This Special 1964 Report is attached as a part of the complaint as exhibit G. The plaintiffs allege that they believe the statement of facts in the Special Report is true and adopt all of that statement of facts as their own.

Exhibit G consists of 16 printed pages in the Record Extract. It is entitled "Statements of Facts Contained in Special 1964 Report Prepared by Maryland and Virginia Milk Producers Association." This Statement first gives the background in regard to the employment arrangements and contracts of Hooper and Robinson. Hooper had been employed by the Association for 29 years prior to his dismissal. He became General Manager and Secretary-Treasurer in 1956. His most recent management contract provided for a salary of $30,000 a year, plus deferred compensation at the rate of 1% per year on any earnings of the Association in excess of the value of milk as determined by Federal Order No. 2 (which amounted to $50,855.55 in the Reserve Account as at December 31, 1963), plus a Pension Plan furnished by the Massachusetts Mutual Life Insurance Company and plus the use of a residential property at Lake Barcroft, Virginia for a monthly rental of $200, which was carried on the Association's books at a net value of $60,422.12 (the cost of the residence is not stated) and which Hooper had the right to purchase at its net value at any time during his employment or within six months after termination of employment.

Exhibit G next describes how Robinson came to be employed by the Association. On November 14, 1955, the Associationpurchased from Robinson and his then partner Melvin Berman the manufacturing dairy products business then being operated as Olney Acres Dairy Products in Laurel, Maryland. The purchase price was $1,000,000 for the business and approximately 20 acres of land with improvements. Additional land was acquired from the parties around July 31, 1957. As of December 31, 1963, the Association's total capital investment, less depreciation, in its Laurel Manufacturing Division was $3,549,725.24. In the beginning, Robinson and his then partner Berman were employed as managers. Their compensation was 5% each of the net profits resulting from the operation of the Laurel plant, the maximum compensation for each not to exceed $20,000 a year or a total of $40,000. Berman later withdrew and thereafter Robinson was sole manager and received 10% of the net profits resulting from the operation of the Laurel plant. In his latest employment contract Robinson was obligated to "cooperate fully with the General Manager and the Board of Directors in carrying out all policy directives" and he was obligated as follows:

> "The said Robinson agrees to devote such time to the management of the said business as may be necessary to conduct said business at the highest degree of efficiency, and said business shall, at all times *** have a first call upon the time and effort of the said Robinson, but he shall have the right, subject to the foregoing, to engage in other businesses for his own account, providing said businesses, or enterprise shall not conflict with the interest of the Association."

The exact figures for the net profits from the operation of the Manufacturing Division, 1958-1963, are then given as follows:

	1958	$ 360,302.14
	1959	827,450.55
	1960	1,003,700.97
	1961	1,020,875.58
	1962	563,732.41
	1963	383,213.49
Total Net Profit		$4,159,435.14

Robinson received the following compensation from 1958 through 1962:

1958	$ 40,000.00
1959	64,602.66
1960	77,376.20
1961	113,430.62
1962	62,636.93

The Statement then gives an account of the various transactions which finally led to the change in management. The first one was in regard to Harrison Dairy Products, Inc. in Jacksonville, Florida. The purchase arrangements and the proposed operations by Hooper and Robinson of these Florida dairy facilities "were never officially or formally approved by the Board *** at any time prior to the commencement of the operation or the making of the investment." The Statement then sets forth the following:

> "Professor Dugan's Fact Finding Report, to be referred to later on, has developed certain information which shows that from time to time, Mr. Hooper and/or Mr. Robinson advised the President of the Association and some of the directors that an investment had been made in the Harrison operation; but on each of these occasions, the advice given was either extremely nebulous or gave the impression that the program had been embarked upon by these two employees for the purpose of benefiting the Association in its effort to gain new markets in the State of Florida.
>
> "Later on, it developed that the actual ownership of the stock in Harrison Dairy Products,Inc. had been placed by Robinson and Hooper in the names of their respective children and Mr. Hooper's wife. This fact, when brought to the attention of the President of the Association in the Fall of 1961, caused him to conclude finally that 'This will never do', with the result that he brought the matter to the attention of the Board of Directors. At that time, the Board was not processed of any details regarding the day to day sales operation of Harrison, but the little it did know about the operation convinced it that it represented the nucleus for a possible conflict of interest."

In January, 1962, the Board sent the Executive Committee to Jacksonville to inspect the Harrison operation.

This Committee after its trip, voted on February 9, 1962, to recommend to the Board that Harrison Dairy Products be purchased by the Association from Hooper and Robinson who were acting as voting trustees for their families. The Board on the same day, February 9, 1962, adopted the recommendation and authorized the purchase "–the sole purpose of the Board being to try by every means available to eliminate any possible area for conflict of interest among its employees." Kendrick was authorized to audit the Harrison operation and to furnish a Certified Balance Sheet and Profit and Loss Statement for Harrison as of March 21, 1962, and to supply certified figures on which the purchase price could be based.

After the reports were completed, the Association entered into an agreement to purchase the entire Harrison operation for $81,341.27. The details of the payment of the purchase price were given, $40,000 was paid upon the signing of the agreement, $20,000 on June 1, 1962, subject to certain possible adjustments and the balance of $21,341.27 when written proof was received from the Internal Revenue Service of the approval of the Harrison return for the period ended October 31, 1961, if no additional income tax were assessed, and if assessed, the additional amounts would be deducted from the purchase price. After the purchase of Harrison, this corporation was dissolved and the Jacksonville operation became the Jacksonville, Florida Manufacturing Division of the Association. The specific figures for the operation of this Division are given and may be summarized as follows:

(a) For the six months ended December 31, 1962, the sales from Cottage Cheese, Skim Powder and Sterile Milk amounted to $110,854.79 upon which a net profit of $5,045.53 was made.

(b) For the year 1963 the sales were $250,784.58 and there was a net profit of $14,032.38.

(c) These figures are compared with the sales and net profit for the 5½ month period of control of the same operation by Hooper and Robinson prior to the sale, from May 8, 1961, to October 31, 1961, during which period the sales amounted to $749,352.03 with a net profit, before income taxes of $54,085.26, so that the sales were three times larger during the 5½ month period than for the entire year 1963 and the net profit was $54,085.26 as contrasted with approximately $19,000 for the 18 month period ending December 31, 1963. It i then stated:

> "These facts constituted a danger signal which convinced a large segment of the Board of Directors that a thorough, independent Fact Finding Study and Audit were absolutely essential. In fact, some members of the Board itself had already commenced to make independent studies of their own to determine what was wrong and why."

The Statement then turns to a consideration of the Mutual Milk Sales, Inc., and Mutual Milk Sales Packaging Division, Inc. (Mutual) transaction at Oneida, New York. Robinson, unknown to the Board when it authorized the purchase of Harrison, had "already embarked upon another brand new venture in the State of New York." Robinson formed these Mutual corporations to construct a milk processing plant in Oneida very similar to the Association's Laurel Plant for the Mutual Milk Producers Federation of New York, a federation consisting of 53 bargaining cooperatives comprised of approximately 6400 members. This venture began around June, 1961, and proceeded until the construction of the plant was completed in 1962. Robinson's participation in this venture had no formal or official approval of the Board or of the President of the Association. Robinson not only participated in the construction of the Oneida plant, and in its sale to the Mutual Federation, but later on accepted employment as manager of the operation of that plant. These activities on top of the Harrison problem, together with several "other unanswered questions then pending before the Board" involving Robinson's management policies and practice at Laurel, resulted in the Board's refusal to renew Robinson's employment contract when it expired on December 31, 1963.

The Statement then gives the event which precipitated action by the Board. On November 8, 1963, James E. Click (Click), Assistant Secretary of the Association, tendered his resignation and presented a statement of charges against Hooper. After a general discussion the Board refused Click's resignation and adopted a resolution that a committee of the president and the first and second vice-presidents make a full investigation of the affairs of the Association and that sufficient funds be appropriated for that purpose. At a Special Meeting of the Board on November 22, 1963, the powers of the investigating committee were delegated to the Plant Committee which was then empowered to take the steps deemed necessary to inquire into the affairs of the Association and to report its findings to the Board as quickly as possible. The Board also decided that Edward J. Merrigan (Merrigan), the Association's new General Counsel, be forthwith invited to attend all meetings of the Board.

The employment of Professor Frank J. Dugan (Professor Dugan), of the Georgetown University Graduate Law School, was then described. Professor Dugan, who enjoys a national reputation as a fact-finder, arbitrator and as a former Dean of the Graduate Law School, was employed by the Association to act as Special Counsel for the purpose of developing the relevant facts in regard to the recent management and operation of the Association with particular reference to the Harrison Matter and the operation of the Manufacturing Division. The Plant Committee made arrangements with Kendrick to work closely with Professor Dugan, and Merrigan was authorized to cooperate. Professor Dugan was authorized to take statements from any officer, director or employee of the Association and to employ a court reporter to transcribe the testimony. He heard 19 witnesses and took 1467 pages of testimony as well as examining hundreds of pages of files and documents. Witnesses were afforded the right to counsel. The investigation took place from December 4, 1963, to February 10, 1964. Professor Dugan filed a 75-page Confidential Report, containing his recommendations and conclusions. Kendrick, who had replaced E. C. Clifford, the regular accountant, was in constant communication with Professor Dugan and, together with Merrigan, they developed detailed audit reports, supported by various records, in regard to the Harrison matter, the Mutual affair and the Laurel Manufacturing Plant relations with both.

The Statement then gives the "essence" of Professor Dugan's Report, based upon the investigation and audit. The Harrison and Mutual transactions are the ones principally covered.

In regard to Harrison, it is stated that after the sale by Harrison of ice cream mix in the Jacksonville area became unprofitable, Hooper and Robinson devised a plan whereby sales made by the Association's Laurel Manufacturing Division were simply diverted, through bookkeeping entries only, to Harrison, which received the benefit of "paper" price mark up on each diverted sale. Some of the sales were diverted from old customers of the Laurel Plant, and in those cases the orders from the old customers were taken at the Laurel Plant and were filled with a product manufactured at the Laurel Plant. On the books of the Association, however, the sale was credited to Harrison but no delivery was made from Laurel to Jacksonville. On the contrary, delivery went directly from Laurel to the old customers. Harrison's books, kept under the same Division Manager who directed the bookkeeping employees at Laurel, reflected each of these alleged "purchases" by Harrison from the Laurel Plant, but at a price considerably below that which Harrison's books showed as the price per pound charged to the actual customer. In short, Harrison was interposed as a "Phantom broker" between the Association and the old customers of the Association, which lost the difference in price thus gratuitously given to Harrison. None of the old customers – with one exception – was located in Florida, but were located in Maryland, Virginia, New York or Wisconsin. Robinson was, in effect, simultaneously *sole salesman* for both Harrison and the Laurel Plant. Any "new" customers developed by Robinson to purchase through Harrison obviously could and should have been credited directly to the Association, without the price differential or brokerage in favor of Harrison. Here again, the deliveries were made directly from the Laurel Plant to the new customers, Harrison's function being exclusively to collect the uncalled for "paper" profit.

Substantially the same arrangement was made in regard to the Mutual transaction by Robinson. Robinson made a deal with Weldon Farm Products (Weldon), a New York export company, toward the end of 1961 whereby Weldon and other exporters were told they could buy skim powder to be manufactured at the new Mutual Oneida Plant at a certain price and that Robinson would guarantee the price. The construction of the Oneida Plant ran into delays and work was stopped entirely on the construction of that plant in the fall of 1961 and did not commence until April 19, 1962. To supply the skim powder, Robinson turned to the Laurel Plant and employed a "Harrison-type" bookkeeping arrangement whereby the Association sold (on the books only) to Mutual and Mutual resold to Weldon. These shipments, however, were made directly from the Laurel Plant to Weldon, but Mutual received a very substantial brokerage fee or price differential on those sales. Mutual paid the Association $800,452.68 for theproduct, but Mutual resold to Weldon for $946,318.42. Mutual did pay the freight. The gross profit to Mutual from the bookkeeping entries amounted to $100,256.23. The "back-up papers" clearly established that all sales from the Association were made directly to Weldon from the Laurel Plant without going through any facilities of Mutual. It is then stated:

> "The Association, through its General Counsel, Mr. Merrigan, formally requested Mr. Robinson to

> produce the books of Mutual Milk Sales Inc. and Mutual Milk Sales Packaging Division, Inc. to show exactly why a price differential or markup was allowed to Mutual, but while Mr. Robinson agreed to cooperate, he finally limited this production to sales invoices only. The books of the Mutual corporation were never produced."

Hooper, when confronted by Professor Dugan with the Mutual-Weldon transaction, stated that he thought that Mutual was a part of Weldon and that when he checked the prices they did not seem out of line with Government sales. When asked why the fact that skim powder sales to Mutual were "consistently the lowest the Association was getting, and usually below the Government support prices," did not put him on notice, he stated:

> "* * * in the light of what has come up, I would certainly question it, but at the time I did not, except to discuss it with them as to whether or not it was in the best interests of the Association, because I did not want to get any more stuff in Government warehouses."

As a result of the Dugan Report and audit, the Board, at its meeting of February 12, 1964, voted that Hooper be asked to resign. Hooper claimed he had a contract with the Association which he intended to work under, wished to consult his attorney and did not consider the matters alleged to justify termination of his contract. The Board then adopted a motion relieving Hooper of his duties as General Manager and removing him as Secretary-Treasurer. Hooper's employment contract had terminated at the end of 1963, and had not been renewed. It is stated that the Board's reasons for terminating Hooper's employment were: (1) the Board felt that Hooper's contract of employment had expired like Robinson's, at the end of 1963, and (2) that under the By-Laws the General Manager, subject to the control of the

Directors, was fully responsible for carrying on the entire business of the Association; a majority of the Board felt that the facts disclosed in the Dugan Report made Hooper responsible directly or indirectly for the over-all losses sustained. The Statement ended with the following summary:

> "In summary therefore, the crucial facts concerning Mr. Hooper were (1) his direct involvement in the Harrison operation and (2) his failure to stop the price advantages given to Harrison and Mutual, even though those prices generally were below the Government support prices and they were consistently lower than those allowed to other customers of the Association's Manufacturing Division. Proof of this last fact is evidence since both Harrison and Mutual were able consistently to 're-sell' the products they purchased from our Laurel Plant at higher prices than those they regularly received from this Association."

In Paragraph 20, Subparagraph (b), it was alleged that Robinson and Hooper, until their resignations or removal from office in 1964, "did in fact administer and direct the entire business ofthe Association." All of the funds, books and accounting of the Association were entrusted to their hands by the Board. Hooper and Robinson by reason of their power and authority "were in fact fiduciaries to the same extent as if they had been the chief executive officers of the Association." It is then alleged:

> "Said delegations of power and authority to Hooper and Robinson by the Board of Directors were unreasonable and excessive and placed in the hands of said individuals the power to defraud the Association and misappropriate the large sum shown in Exhibit G."

In Subparagraph (c) it is alleged that Hooper and Robinson together misappropriated corporate assets, funds and business as described in exhibit G, and in so doing, "they together violated the fiduciary obligations which they had assumed with respect to the operations of the entire business, and more particularly, the Laurel plant."

In Subparagraphs (d) and (e) it is alleged that the facts set forth in exhibit G demonstrate a conspiracy between Hooper and Robinson to misappropriate corporate assets, funds and business and to collectively defraud the Association. In doing this they became constructive trustees of all of the assets and property so obtained by the Association. Each participated in the breach of trust by the other. The Association continued to hold equitable title to the diverted property and hence Hooper and Robinson could not by paying back part of the misappropriated property extinguish the Association's equitable title to the remainder of the property; the so-called release, obtained by them for an inadequate consideration was, and is, void and should be set aside by the Court.

In Subparagraph (g) it is alleged that notwithstanding the disclosure of the facts appearing in exhibit G to the Board, the Board "remained 'very significantly divided when it came time to vote on whether Mr. Hooper should have been terminated as general manager, and previously on the question of whether Mr. Robinson should have been retained at the Laurel Plant.' " It is then alleged as follows:

> "In the light of the manifest frauds committed by said defendants, complainants charge that only persons usbject to undue pressure and influence by said defendants, or persons implicated in their wrongful acts could have supported retaining them in office. Complainants are unable to name the directors who unreasonably supported Robinson and Hooper in said votes, but charge that those directors condoned the frauds and wrongs committed by said Robinson and Hooper, and endeavored to prevent disclosure of

> said frauds and wrongs to the members of the Association. The records of the Association will disclose the names of said directors, and complainants, as well as this Honorable Court, are entitled to full disclosure thereof."

Paragraph 21 of the complaint considers the Dugan Report. It is alleged that it was promulgated in 1964; that Parish and other members repeatedly requested that they be permitted to examine it; that the defendants have conspired together to suppress it; and, that President Remsberg, at the Annual Meeting in February, 1964, advised that the Report was being prepared and as soon as it was completed members would be permitted to examine it, "but the said defendant directors have refused to honor said promise and commitment by the then chief executive officer of the Association." It is then alleged:

> "On information and belief complainant charges that the suppression of said Report is not justifiable for any corporate purpose, and the said defendants have suppressed the same because of apprehension that it may lay the foundation for imposing personal liability on them for huge losses suffered by the Association."

In Paragraphs 22 and 23 it is alleged that certain of the defendant directors, whose identity is not available to the plaintiffs at this time, have further conspired together "to suppress, color and falsify information rightfully due the members" in regard to the operation of the Association, both in its Annual Reports and otherwise, and by doing this, have hindered and obstructed efforts to bring the defrauders to justice over a long period of years by lulling the members into a false sense of security causing them to take no action until after the running of the three-year statute of limitations as to many of the acts complained of (if the statute of limitations is applicable) and by the delay and and obstructions have made it more difficult to ascertain and prove the necessary facts to establish these claims. It is also alleged that certain defendant directors, whose identity is not presently available to the plaintiffs, have fraudulently concealed the causes of action complained of and have collectively fraudulently concealed and conspired among themselves and with others to conceal those causes of action.

In Paragraph 24 it is alleged that the conspiracy, already mentioned, to withhold the facts disclosed in the Dugan Report is demonstrated by the conduct and remarks of an authorized representative of the Board at the Annual Meeting of members on February 22, 1965, contained in an excerpt from the transcript of that meeting filed as part of the complaint as exhibit H. This exhibit gives the colloquy between Merrigan, the general counsel of the Association, and Mr. Fulks, a member of the Association. Fulks put the direct question to Merrigan: "Can I, as a member, can I ask to see the * * * original Dugan Report? Can I read it, can I have it?" Merrigan replied that "It is a matter involved in a court proceeding." Fulk persisted and stated: "* * * Can I see it or can't I see it? Is it under the rug and the directors standing on it?" After denying that it was under the rug and the directors standing on it, Merrigan stated: "There is nothing in the Dugan Report essentially that has not already been told you. Did you attend the meetings last spring, when the directors made a report to you, at your district meeting?" After Fulks stated that he was in Florida at that time, Merrigan stated: "In any event, the substance of the Dugan Report has already been made available to most of the members – to all of the members who attended their district meetings." After giving the background of the employment of Professor Dugan, Merrigan stated:

> "It was a fact-finding thing. Professor Dugan who made the report insisted as part of his own employment that he would do that only if his report would be confidential, because he wanted to make an honest straightforward answer which could not be

> used anywhere else against him, if he went out and did an honest job. He took approximately two or three thousand pages of testimony and then made a report which he himself wrote across the front cover 'confidential,' meaning that it was for the use of the Board. The day that report was filed with the Board, the Board took certain extreme actions against some employees at that time. All of this was involved – could have been involved in litigation which would not have helped your backyard poultry one bit, either. So the Board of Directors in their best judgment have not put it on the front page of the Washington Post or in the Culpepper newspaper or in the Frederick newspaper as other people are trying to do. But there is nothing in that report that essentially any member should not already know if he went to his meetings last spring.
>
> "The answer is the Dugan Report will not be circulated around to people that want to put it in the newspaper until a court says we should do that, and then it is no longer our judgment, it is the court's judgment."

Merrigan further stated that Professor Dugan made the report acting in his professional capacity as an attorney and that he "insisted that the attorney-client privilege cover it. He made it to the Board." When again pressed by Fulks as to whether he could see the Dugan Report, Merrigan replied, "The answer at the present time is no, because the matter is involved in a court proceeding."

In Paragraph 25 the participation and conspiracy of Kendrick, the accountant, to conceal the true facts, in regard to the derelictions of Hooper and Robinson and the losses to the Association in the sale of the Embassy, Wakefield and Richfield Dairy assets, by consciously issuing incorrect and misleading statements in respect to these matters are alleged.

The details are then given. There was no disclosure in the 1963 financial statements, certified by Kendrick under date of February 7, 1964, of the improper Hooper and Robinson diversion of $1,300,000 of the Association's business to their Florida plant by book entires, although these matters had been brought to Kendrick's attention. The 1961 financial statements issued by Kendrick and included in the 1961 Annual Report of the Association included a "so-called" capital gain of $435,794 on the Embassy sale, without disclosing that the sale included the Wakefield and Richfield stock, and that losses or charge-offs exceeding $1,000,000 applicable to these assets had been incurred. The fictitious capital gain was carried into the operating statement for 1961; yet in 1963 when the $500,000 discount was allowed applicable to this sale, this was not included in the operating statement or mentioned in any footnote to the statement. The only mention of the transaction was contained in a charge to surplus identified as "Discount allowed on payment of Eastern Food Products, Inc. Note $500,000.00", which, it is alleged, "Kendrick well knew * * * did not identify the loss as applicable to the Embassy Dairy sale and therefore must be deemed to have intentionally concealed the fact from the members of the Association to whom said Report was issued."

In Paragraph 26 it is alleged that because of the long course of conspiracy and concealment of facts from the membership, the members were not in a position to vote intelligently at the Annual Meeting of February 22, 1965, and to have determined whether the defendant directors should have been replaced by new directors and further that they will never be able to vote intelligently until they have full information in regard to the acts of management made available through this litigation or otherwise and particularly until the Dugan Report is made available for circulation among the members. A resolution was made at the February 22, 1965, meeting of members to express confidence in the directors and to pay any judgments rendered against them.

The plaintiffs voted against this, endeavored to be recognized to speak against it, but the minutes, on information and belief, state that only one persion, "Mrs. Wharff", voted against it, even though there was a large vote in opposition. It is alleged that the resolution is without legal significance, but it demonstrates that the present officers and directors are now in control of the Association and "it would have been wholly futile" for the plaintiffs to apply to the membership with any reasonable hope that any might authorize the filing of a suit against directors in the name of the Association.

In Paragraph 27 the times and circumstances in regard to when the plaintiffs discovered the wrongs complained of in the complaint are set out. Without giving the detailed facts alleged, it is sufficient to state that the plaintiffs did not learn of the wrongs, or facts putting them on notice, until 1964 (the plaintiff Wenger knew some facts in either December, 1963 or January, 1964). Parish learned of the Hooper wrongdoing in February, 1964, when they received a circular letter from M. Belmost Verstandig, the public relations official of the Association, complaining of the dismissal of Hooper by the Board "on the ground that everything that Mr. Hooper had done was done with the full knowledge of the Board of Directors and with their full consent and approval." The derelictions of Hooper and Robinson were announced by Remsberg, as president of the Association, at the Annual Meeting late in February, 1964. The plaintiffs learned in late 1964 of the substantial losses in the Embassy sale, and were prevented from learning of these facts earlier by the fraudulent concealment by the directors. Beginning in May, 1964, the plaintiffs were advised, at regional meetings of the Association, that the investigation had been completed and "an outline of the expected and promised Dugan Report was read orally to those present at such meetings." The plaintiffs asked to see and obtain a copy of the outline of the Dugan Report but these requests were refused. Parish, "also sought and obtained the signatures of more than five percent of the members on petitions requesting access to the books and records of the Association but said request was denied as not being in proper form." Parish propounded questions, answers to which were refused. Present counsel was employed in November, 1964, who immediately investigated the claims and filed with reasonable diligence a complaint in the Circuit Court for Baltimore County, followed by filing the present complaint on February 4, 1965. The other plaintiffs intervened on April 7, 1965.

The prayers for relief are that:

1. The individual defendants be required to account to the Association for all profits derived by them from dealings with the Association with respect to the matters alleged in the complaint;

2. The individual defendants, including Kendrick, be determined and decreed to be jointly and severally liable to the Association for all losses suffered by it "through acts, connivance, negligence, culpable inattention and derelictions of duty of them and each of them";

3. The purported general releases to Hooper and Robinson should be set aside and cancelled;

4. The Association be ordered to institute and maintain appropriate litigation by independent counsel in other jurisdictions against persons named as defendants in this suit who cannot be reached by the court's process; and

5. The plaintiffs have other and further relief.

The complaint is followed by an affidavity by Frank P. Parish, one of the plaintiffs, that the facts alleged "are true and correct, except as to allegations made on information and belief, and as to such allegations, he has made a reasonable investigation thereof and certifies them to be true and correct to the best of his knowledge, information and belief."

The demurrers of the various parties defendant raise the following questions for our consideration:

1. Does the complaint allege sufficient facts which constitute actionable fraud, waste of corporate assets, gross negligence or culpable mismanagement on the part of the directors?

2. Does the complaint allege sufficient grounds to excuse the plaintiffs from exhausting their intra-corporate remedies before seeking to institute the present suit?

3. Does the complaint allege facts which entitled the plaintiffs to disclosure of the Association's records in view of the provisions of Code (1957), Article 23, Section 51?

4. Are the claims against the defendant directors which arose more than three years prior to the filing of suit barred by laches?

5. Are the matters complained of in the complaint barred by the doctrine of *res judicata* as to those director defendants whose demurrers to the Second Amended Bill of Complaint were sustained without leave to amend?

6. Do the Parishs, as plaintiffs, have standing to maintain a derivative action on behalf of the Association when they sold their cowhered in the spring of 1966?

7. May a derivative suit be maintained in regard to events antedating the membership of a member of the Association?

8. Does the complaint allege facts which would justify the setting aside of the general release to the defendant Robinson?

9. Is the complaint multifarious as to the defendant Robinson?

We will consider these questions in the order indicated.

1.

[1] We are of the opinion that the complaint alleges sufficient facts to constitute, prima facie, actionable fraud, waste of corporate assets, gross negligence or culpable mismanagement on the part of the defendant directors.

[2] In ruling on a demurrer to a bill of complaint, the truth of all material relevant facts properly alleged, together with the inferences which may reasonably be drawn from those facts, is admitted. See Killen v. Houser, 239 Md. 79, 210 A.2d 527 (1965), and prior Maryland cases cited in the opinion in that case. Maryland Rule 301 b permits the adoption of an exhibit by reference as part of a bill of complaint.

It has been necessary for us to set out in some detail the allegations of the complaint as the Chancellor was of the opinion that these allegations, with their reasonable inferences, did not state actionable fraud, waste of corporate assets, gross negligence or culpable mismanagement on the part of the defendant directors. As we have indicated, we do not agree with the Chancellor's conclusion. In the Chancellor's opinion certain phrases and statements found in some of the paragraphs of the complaint are selected and these selected portions are treated as representative of the entire complaint. These selected portions are for the most part taken from paragraphs 6 and 7 of the complaint which, as has been seen, are introductory paragraphs to those that follow. It is in these subsequent paragraphs that many of the ultimate facts of the fraud, concealment, illegality, gross negligence, waste of corporate assets and conspiracy to conceal certain losses appear. See the allegations in paragraphs 8 through 15 and 17 relating to the purchase, operation and sale of the Association's Fluid Milk Division, paragraphs 18 through 20 relating to Hooper and Robinson, paragraphs 21 through 24 relating to the concealment from the membership by the director defendants of the results of their investigation into the operation and management of the Association affairs and paragraph 25 in regard to Kendrick's participation in the conspiracy to conceal.

Fraud and Concealment

The fraud alleged against the director defendants and the defendant Kendrick consists principally of allegations charging them with concealment of facts which should have been accurately disclosed to the Association and its members, but which were concealed by the publication of false and misleading annual reports. A conspiracy to conceal is also alleged. See the allegations in paragraphs 13 and 21 to 24, supra.

[3-5] It is well established that actionable fraud may result from the concealment of material facts as well as from the false statement of material facts. See Levin v. Singer, 227 Md. 47, 175 A.2d 423 (1961). It is equally well-settled that it is not necessary to charge the defendants specifically with "fraud" or with "acting fraudulently" if the facts alleged indicate fraud or are such that fraud is necessarily implied from the alleged facts. As was stated in 24 Am. Jur., Fraud and Deceit § 244, pages 74-75:

> "Fraud may be well pleaded even though the conduct referred to is not alleged expressly to be 'fraudulent', provided the facts alleged are such as constitute fraud in themselves or are facts from which fraud will be necessarily implied. The acts charged are not less fraudulent because the word 'fraud' or 'fraudulent' is not employed by the pleader characterizing them. In other words, an allegation of facts from which the conclusion of fraud necessarily results in sufficient. Neither law nor equity requires that the specific details of the transaction in which

> fraud is predicated, or facts which are merely evidentiary, be pleaded. Conversely, where fraud is sufficiently alleged, the pleading is not affected by superfluous allegations of facts not constituting fraud." (Footnotes omitted.)

See also 37 C.J.S. Fraud § 80, page 374.

[6] In the present case, the plaintiffs have alleged in paragraphs 22 and 23 that there was a *fraudulent* concealment by certain of the defendant directors, whose identity is not yet available to the plaintiffs, and that collectively they have *fraudulently* concealed and conspired among themselves to conceal the cause of action of the Association. Thus, fraud has been specifically charged in the complaint after the facts establishing it have been previously alleged.

The fraud and concealment, as well as the clear breach of fiduciary duty on the part of Hooper and Robinson are specifically and graphically alleged in paragraphs 18, 19 and 20 of the complaint. Many of the specific acts of fraud, doubledealing and breach of fiduciary duty are described in detail in exhibit G, which is a statement taken, in part, from the Dugan Report and which was circulated by the defendant directors for use in oral presentation to the members at the district meetings. There appears to be no contention by the defendants that these allegations are not sufficient to charge Hooper and Robinson with fraud, concealment, doubledealing and breach of fiduciary duty. The defendants take the position that the general release given Hooper and Robinson is shown to be a complete bar on the face of the complaint. As we will point out later in this opinion, that position is not well founded.

[7] It is clear that officers and directors of a corporation stand in a sufficiently confidential relation to the corporation's stockholders to impose a duty upon them to reveal all facts material to the corporate transactions. A.B.C.

Packard, Inc. v. General Motors Corp., 275 F.2d 63 (9th Cir. 1960). See 37 C.J.S. Fraud § 16, page 248. The confidential relation is even more apparent in a member corporation such as the Association. The allegations of the complaint indicate that the members have not been properly informed by the officers and directors of the Association in regard to the various transactions set forth in the complaint and, indeed, that the members have been deceived by the false Annual Reports. The members have been lulled into inaction and the Association has been damaged by failing to take action promptly to assert its rights so that possible defenses of limitations may have accrued and, in any event, it has been made more difficult to ascertain and have the facts necessary to establish the claims of the Association.

The complaint sufficiently alleges facts which in themselves indicate a fraudulent concealment by the defendant directors and the defendant auditor and active fraud by Hooper and Robinson as well as a fraudulent concealment by them and breach of fiduciary duty. The concealed facts were material, properly relied on by the Association and its members, and the Association's damage resulting therefrom has been alleged.

Gross negligence, waste of corporate assets and culpable mismanagement

[8-10] It is well established that courts generally will not interfere with the internal management of a corporation at the request of a minority stockholder or a member. The conduct of the corporation's affairs are placed in the hands of the board of directors and if the majority of the board properly exercises its business judgment, the directors are not ordinarily liable. This sound general rule, however, is subject to the important exception that directors *will be held liable* if they permit the funds of the corporation or the corporate property to be lost or wasted by their gross or culpable negligence.

In 1881 Judge Alvey, in Booth v. Robinson, 55 Md. 419, for the Court, reviewed the cases in this country and in England and established the Maryland law that directors were personally liable for the consequences of their gross negligence, adopting the rule expressed by the House of Lords in Overend v. Gibb, L.R. 480 (1872). Booth v. Robinson was cited with approval and followed in Fisher v. Parr, 92 Md: 245, 48 A. 621 (1901); v. Reus Permanent Loan & Savings Co. v. Conrad, 101 Md. 224, 60 A. 737 (195) in Emerson v. Gaither, 103 Md. 564, 61 A 26, 8 L.R.A., N.S., 738 (1906); in Murphy v. Penniman, 105 Md. 452, 66 A. 282 (19) in Foutz v. Miller, 112 Md. 458, 76 A. 1111 (1910); and in Carrington v. Thomas Basshor Co., 118 Md. 419, 84 A. 746 (1912. In Carrington v. Thomas C. Basshor Co. the Court compared the liability of one of the directors of the Hammond Ice Company resulting from his gross and culpable negligence with the ordinary negligence of the other directors who were held not to be liable under the facts of that case.

We do not understand that our predecessors intended to depart from this well established rule by the opinion of the Court in Pritchard v. Myers, 174 Md. 66, 77, 197 A. 620, 625-626, 116 A.L.R. 775 (1938), inasmuch as the Court in the opinion in that case relies on Carrington v. Thomas C. Basshor Co., Foutz v. Miller, Murphy v. Penniman, and Emerson v. Gaither, although the language in the opinion might seem to indicate liability for the failure to exercise reasonable skill and care rather than for gross negligence. Cf. Feinberg v. George Washington Cemetery, Inc., 226 Md. 393, 174 A.2d 72 (1961).

The Maryland law is summarized in Brune, Maryland Corporate Law and Practice, Rev. Ed. 1953, Sec. 226, page 225 as follows:

> "In addition to the specific statutory liabilities and penalties just outlined, a director may, of course, be liable to the corporation or its receiver for the

> consequences of breach of his fiduciary duties. Thus, it is said that directors are liable for 'gross and culpable negligence' in the discharge or omission of their duties." (Footnote omitted.)

See also 3 Fletcher, Corporations, § 1048, page 639, where it is stated:

> "Directors are also liable if they suffer the funds of the corporation or its property to be lost or wasted by gross negligence and inattention to the duties of the trust." (Footnotes omitted.)

The United States Court of Appeals for the Fourth Circuit in McQuillen v. National Cash Register Co., 112 F.2d 877 (1940), a case governed by Maryland law, quoted with approval a summary of the Maryland law given by Judge Coleman in the District Court in the same case, as follows:

> "It is not the function of a court of equity to attempt to substitute its judgment for that of the persons who are lawfully in control of a corporation's affairs, *once it has been determined that their conduct is neither ultra vires, fraudulent, illegal nor grossly negligent.*" (Emphasis supplied.) (112 F.2d 883)

In our opinion, the complaint alleges facts sufficient to establish the liability of the defendant directors for gross negligence, waste of corporate assets and culpable mismanagement.

The allegations of the complaint, fortified and elaborated by the facts appearing in exhibit G, indicate that the Board placed complete confidence in Hooper, the Association's general manager, and in Robinson, the manager of the manufacturing division. Hooper had been in the employment of the Association since February 1935 and became general manager and secretary-treasurer of the Association in 1956. Robinson's employment as manager began in 1955 when the Association purchased the Laurel manufacturing dairy products business from Robinson and Berman. It is clear from the allegations of the complaint and the statements in exhibit G that Hooper and Robinson in May, 1961, conspired to defraud the Association by competing with it through Harrison Dairy Products, Inc. in Florida and diverting the Association's accounts. It is also clear that Hooper and Robinson did not obtain the approval of the Board for the operation, but, on the contrary, misled the president and some of the directors in regard to the nature of the Harrison operation. It may be that the affording of complete trust and confidence to Hooper and Robinson at this time could be said to be only ordinary negligence, but beginning in the Fall of 1961, when the president of the Association discovered that the stock of Harrison was in the names of the Hooper and Robinson children and Hooper's wife, and certainly after January and February 1962, when the Executive Committee had been to Florida to inspect the Harrison operation, the allegations of the complaint in regard to the conduct of the Board in regard to Hooper and Robinson are sufficient to indicate gross negligence and culpable mismanagement. The competing nature of the Harrison operation was clearly known to the Executive Committee and to the Board on February 9, 1962, when, extraordinarily enough, the Executive Committee recommended to the Board, and the Board accepted the recommendation, that the Association *purchase Harrison* from the families of the two conspirators, Hooper and Robinson, for the "sole purpose" to try by every means "to eliminate any possible area of conflict of interest among its employees." Kendrick was instructed to make an audit of the Harrison operation as of March, 1962, in order to supply figures on which the purchase price could be based. On April 12, 1962, the Harrison operation was purchased for $81,341.27. The reasonable inferences from this are (1) that the Board had *actual knowledge* of the conflict in interest in which Hooper and Robinson had engaged, and (2) instead of immediately investigating the Harrison operation as it related to the Association, the Board not only failed to do this, but, on the contrary, purchased the competing operation to eliminate the conflict of interest of the faithless employees. Later in exhibit G it appears that the diversion of the Association's customers and their accounts from the Association to Harrison appeared on the books of either Harrison appeared on the books of either Harrison or the Association, or both, and the fraudulent and illegal "brokerage fee" or price differential could obviously have been discovered in the spring of 1962 if the indicated investigation of the Hooper-Robinson operation had been made. Moreover, other facts appeared which cried out for a complete investigation of the Hooper-Robinson operation of the Association's affairs. As appears in exhibit G, the audit of the Harrison operation showed that while Hooper and Robinson were operating the conflicting business for the approximately 5½ month period from May 8, 1961, to October 31, 1961, there were sales in the amount of $749,352.03 with a net profit, before income taxes, of $54,085.26, whereas for the six months ended December 31, 1962, there were only sales of $110,854.79 with a net profit of $5,045.53 and for the entire year 1963 there were sales of $250,784.58 with a net profit of $14,032.38. This startling difference should have put the directors on inquiry to ascertain its cause. Here again the books and records of Harrison and of the Association would have disclosed the true situation.

[11] Nothing, however, was done by the Board and apparently nothing would have been done until Click, the assistant secretary, on November 8, 1963, tendered his resignation and made the statement of charges against Hooper. This courageous and proper action finally caused the Board at the special meeting of November 22, 1963, to take steps to inquire into the affairs of the Association. Thereafter Professor Dugan was employed and the facts were then brought out. The Board did nothing to investigate the

conduct of either Hooper or Robinson from the time of their actual knowledge of the wrongful conduct in the Harrison matter in January, 1962, until November of 1963, a period of approximately one year and ten months. If an investigation had been made the Board would most likely have discovered the Robinson Mutual venture in Oneida as the plant there was not completed until after January 1962. If this conflict in interest of Robinson's had been discovered (he participated in the construction of the Oneida plant and was employed as manager of this operation by Mutual), the entire scheme to defraud the Association would never have been effectuated. The failure of the Board to investigate the operation of Hooper and Robinson after actual knowledge that they were faithless employees is, *prima facie,* gross negligence and culpable mismanagement for which the defendant directors are liable for resultant losses to the Association. As we will consider later, the allegations of the complaint are sufficient to indicate that the general release to Hooper and to Robinson was improvident, the result of gross negligence and culpable mismanagement and *prima facie,* should be set aside.

The Embassy Dairy Purchase and the Violations of the Sherman Anti-Trust Act.

The complaint, in paragraphs 8 to 15, alleges the facts in regard to the purchase of the Embassy Dairy in the District of Columbia with the intent to violate the anti-trust laws of the United States, the various court proceedings in regard to this violation, the requirement of the sale of Embassy and the improvement sale, the $500,000 discount, and the attempt to circumvent the decree of the United States District Court for the District of Columbia.

On August 1, 1954, by authorization by the Board, Embassy was purchased by the Association. The United States District Court for the District of Columbia in a suit filed by the United States against the Association to enjoin the violation of the Sherman Anti-Trust laws found, after a trial on the merits, and this purchase was entered into "with the intent and purpose of restraining trade." See United States v. Maryland & Virginia Milk Producers Ass'n, 168 F. Supp. 880, 881 (D.D.C. 1959) (Holtzoff, J.). Earlier, this same Court had held that the "price paid by the Association for the transfer was far in excess of the actual and intrinsic value of the property purchased." See United States v. Maryland & Virginia Milk Producers Ass'n, 167 F. Supp. 799, 806 (D.D.C. 1958) (Holtzoff, J.). The District Court had earlier held that the Association had not violated Section 2 of the Sherman Anti-Trust Act (see United States v. Maryland & Virginia Milk Producers Ass'n, 167 F. Supp. 45 (D.D.C. 1958) (Holtzoff, J.)) but this decision was reversed by the Supreme Court of the United States in Maryland and Virginia Milk Producers Ass'n v. United States, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880 (1960) (Black, J.). The Supreme Court of the United States, however, affirmed the decision of the District Court holding that the Association had violated Sections 1 and 3 of the Sherman Anti-Trust Act and ordering a divestiture of the Embassy assets within a reasonable time. The complaint alleges that the Association's appeal to the Supreme Court was "fruitless" – as it indeed turned out to be – and that it cost more than $300,000.00. The cost of Embassy to the Association was alleged to be $3,890,000, in addition to which the Association expended large sums in improvements from 1954 to 1961 and, on information and belief, the cost basis of the Embassy property at the time of its sale in 1961 was in excess of $5,000,000. On November 4, 1960, a memorandum of sale for the Embassy assets was executed, effective January 1, 1961 – approved by 17 of the 21 members of the Board – by which the Embassy assets were sold to Metropolitan Food Corporation, which on information and belief, "had no assets." The selling price for the Embassy assets was $3,250,000, but no cash or other assets were paid by Metropolitan. The cash paid was that in the hands of Embassy on the date of settlement. This sale also included the capital stock of Wakefield and Simpson. The terms of sale have already been set forth and it appears that there was indeed no cash or other assets paid down by the purchasers, the non-interest bearing note for $250,000 was payable only from collections made on the notes and accounts receivable, and the $3,000,000 note, payable in semi-annual installments of $100,000 each over a 15 year period with a final settlement of $500,000, the first installment to begin 2 years after date of settlement, was not secured by any mortgage or pledge of assets but did bear the endorsement of Irving D. Berger. This arrangement, supported by exhibit F in regard to the terms of sale, is alleged to be a gift of corporate assets of substantial value which has cost the Association not less than $5,000,000.

The false and misleading statements in the Annual Reports of 1960, 1961 and 1962 are alleged, as well as the discount of $500,000 during 1963 on the $3,000,000 note, without any collection from, or proceeding against, Berger, who had endorsed the note. It is alleged that not only did the original transaction result in a loss, rather than the "capital gain" stated in the Annual Reports, but this "discount" further increased the loss.

[12, 13] Although the ultimate determination that there has been a violation of the anti-trust laws of the United States by a corporation may not, *per se*, result in a finding of gross negligence or culpable mismanagement on the part of the directors of the corporation, the allegations in the complaint in this case establish, *prima facie*, such gross negligence and culpable mismanagement. As alleged, the directors deliberately purchased Embassy to eliminate competition and violate the anti-trust laws and the evidence reviewed by the District Court clearly indicates that this was the situation. In view of the decision of the Supreme Court of the United States in United States v. Borden Co., 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181 (1939), decided before the purchase of Embassy in 1954, it was apparent that the possible exemption of the Association from the operation of the anti-trust laws was so doubtful that it was, *prima facie*, an act of gross negligence

and culpable mismanagement to proceed with the expenditure of $3,890,000 – far in excess of the actual and intrinsic value of the property – and to expend further amounts on the Embassy property, without first obtaining clearance from the Department of Justice in regard to whether or not, in its opinion, the purchase would violate the anti-trust laws.

[14] The sale of the Embassy assets for $1,750,000 less than the cost to the Association and the extraordinary provisions of sale, without the payment of any cash or delivery of assets by the purchaser – alleged to be a corporation without assets – with no security for the $3,000,000 noty by mortgage or a pledge of assets with a later discount of $500,000 without a proceeding against, or even a demand upon, the endorser of the note are, *prima facie,* acts of gross negligence or culpable mismanagement by the directors involved. This is also indicated by the misleading statements appearing in the Annual Reports of 1960, 1961 and 1962 and these misleading statements also involve Kendrick with the involved directors as alleged in paragraph 15 of the complaint.

It may be, of course, that the involved directors may be able to show at the trial on the merits that their conduct in all or part of the matters above set forth was not grossly negligent or the result of culpable mismanagement, but as we have indicated the allegations of the complaint indicate, *prima facie,* that the involved directors were grossly negligent or guilty of culpable mismanagement.

2.

We are of the opinion that the complaint alleges sufficient grounds to excuse the plaintiffs from exhausting their intra-corporate remedies before seeking to institute the present suit.

[15-18] It is well established that ordinarily the courts will not entertain arrivative suit by a stockholder on behalf of a corporation until it appears that the intra-corporate remedies have been successfully pursued by the complainant stockholder. This means that, generally speaking, the complaining stockholder will make demand upon the corporation make demand has been refused or ignored. This general rule, however, is subject to a well-recognized exception, i.e., that such prior demand is required when it would be futile. Our predecessors in R ler v. Eastern States Corporation, 182 Md. 329, 333, 35 A.2d 118, 119 (1943) cited in C. J. Corporations § 1339 as stating the general rule as follows:

> "Before a stockholder may sue the Corporation to enforce ~~and protect its~~ rights or to redress wrongs to it, he must first make an earnest and unsuccessful effort to obtain remedial action by the Corporation itself, first by application to the directors, and then by application to the bodv of the stockholders. *But he need not do so where the circumstances are such that an application would be futile.*" (Emphasis supplied.)

Judge Coleman in his opinion in the United States District Court for the District of Maryland in considering and sustaining the sufficiency of a complaint charging fraud on the part of the directors of a stock corporation, in McQuillen v. National Cash Register Co., 22 F. Supp. (D. Md. 1938), aff'd, 112 F.2d 877 (4th Cir. 1940), cert. denied, 311 U.S. 695, 61 S. Ct. 140, 85 L.Ed. 450 (1940), rehearsing denied 311 U.S. 729, 61 S.Ct. 316, 85 L.Ed. 4 (1940), stated:

> "It is well settled that this portion of Equity Rule 27[1] must be applied to a practical,

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[1] The portion of Equity Rule 27 referred to provided as follows: The bill of complaint must "set forth with particularity the efforts of the plaintiff to secure such action as he desired on the part of the managing directors or trustees, and, if necessary, of the stockholders, and the causes of his failure to obtain such action, or the reasons for not making such effort."

> common-sense manner. Delaware & Hudson Co. v. Albany & Susquehanna Railroad Company, 213 U.S. 435, 29 S.Ct. 540, 53 L.Ed. 862; Krouse v. Brevard Tannin Company, 4 Cir., 249 F. 538. In the present suit the bill alleges that the fraud of which plaintiffs complain has been committed by the present directors of the National Cash Register Company, all of whom have been made parties defendant. The bill further states that plaintiffs have made no effort to secure action on the part of the directors, officers, or shareholders for the reason that 'The Company is, and has been for many years, dominated and controlled by the individual defendants, who constitute a large majority, or practically all, of the present officers and directors. If the individual defendants were permitted to conduct this suit, it would be prosecuted by them for the company against themselves.' It thus clearly appears that an appeal to the directors would be futile, since it is apparent on the face of the pleadings that thereir interests are antagonistic to those of the plaintiffs. Surely, the usual preliminary steps incident to a stockholder instituting a suit of this kind are not to be treated as indispensable, when the interests of the directors are antognostic to those of the corporation, and such fact is shown by the pleadings. The same common-sense rule must be applicable with respect to the requirement of first appealing to stockholders through regular or special meetings." (Citing cases.) (22 F. Supp. 874)

See also 19 Am. Jur. 2d Corporations, § 540, page 77.

[19, 20] As we are of the opinion, as above set forth, that the allegations of the complaint state causes of action against the defendant directors for acts of fraud, concealment, illegality, gross negligence, waste of corporate assets and conspiracy to conceal losses and causes of action, and as it is alleged that a majority of the Association's present Board

have participated in various of the alleged acts, it is clear to us that it would be futile for the plaintiffs to make demand upon those directors to cause the Association to sue them to recover for their own wrongful injuries to the Association. It is well established under these circumstances that the plaintiffs, as minority members of the Association, are excused from the usual requirement that they make a prior demand upon the directors as a condition precedent to maintaining a derivative action. Indeed, as the Supreme Court of Missouri stated in Caldwell v. Eubanks, 326 Mo. 185, 192, 30 S.W.2d 976, 979, 72 A.L.R. 621 (1930) "* * * the court would not permit them (directors) to conduct litigation against themselves even if they were willing to do so." See Winter v. Farmers Educational and Coop. Union of America, 259 Minn. 257, 107 N.W.2d 226 (1961). Russell v. Weyand, 5 Cal. App. 2d 259, 42 P.2d 381 (1935), Bissell v. Taylor, 229 App. Div. 369, 241 N.Y.S. 717 (1930), and Craftsmen Finance and Mortgage Co., Inc. v. Brown, 64 F. Supp. 168 (S.D.N.Y. 1945). See also 13 Fletcher, Cyclopedia of Corporations, § 5965 at page 471 where it is stated:

> "Demand on the directors is excused where the alleged wrongdoers constitute a majority of the board of directors * * * ." (Footnotes omitted.)

[21] The plaintiffs are also excused from making prior demand upon the members before instituting the derivative suit. Here again such a demand would be futile as the majority of the directors of the Association are defendants charged, *prima facie*, with the wrongful conduct for which the Association will sue. As these directors control the Association, the Association under their management could not effectively or properly prosecute the litigation. See McQuillen v. National Cash Register Co., supra; Hand v. Kansas City Southern Railroad Co., 55 F.2d 712 (S.D.N.Y. 1931). It also is alleged that at the annual meeting of February 22, 1965, a short time after filing the suit in the present case on February 4, 1965, a resolution was allegedly

passed by the majority of the members expressing confidence in the present Board and undertaking to indemnify them for the payment of any judgments which might be rendered against them, a resolution declared to be carried although the complainants tried unsuccessfully to be recognized and speak against it. This extraordinary action indicates the futility of requiring a prior demand on the members by the Complainants. See Escoett v. Aldecress Country Club, 16 N.J. 438, 109 A.2d 277 (1954), and Winter v. Farmers Educational and Coop. Union of America, supra.

[22] Then too, it is alleged that the plaintiffs were refused (unalwfully as we shall later point out) the list of members, so that it would have been practically impossible for them to acquaint themembership with the relevant facts allegedly concealed from the members of the Board. This fact alone is sufficient to excuse the minority members from making prior demand upon the general membership. See Escoett v. Aldecress Country Club, supra.

[23-26] Nor may a majority of the membership ratify the fraudulent action of the directors. Cf. Pennsylvania R.R. Co. v. Minis, 120 Md. 461, 87 A.1062 (1913). See also 19 Am. Jur. 2d Corporations, § 542, pages 78-79:

> "A requirement of application to the general body of stockholders is not absolute and will readily give way in the interests of justice. A stockholder need not seek action by the stockholders as a body, where under the facts he cannot do so or it would be unreasonable or useless to require it. Thus, if the body of stockholders has no adequate power or authority to remedy the wrong asserted by the individual stockholders, an application to it to redress the wrong before bringing a representative action is unnecessary. It has been held that if a stockholder's derivative action is based upon an alleged wrong committed by directors against the corporation, of

> such a nature *as to be beyond ratification by a majority of the stockholders, as in the case of fraud,* it is not necessary to make a demand upon the stockholders before bringing the action. Resort to the general body of stockholders would be unnecessary where it * * * affirmatively appeared to be futile or impracticable or otherwise unwarranted." (Emphasis supplied.) (Footnotes omitted.)

[27, 28] For the reasons already stated it seems apparent that the plaintiffs are not required to pursue the remedy of mandamus against the directors, as the Chancellor thought was required. The framing and prosecuting of a suit against the defendant directors would require the exercise of personal judgment and would not be a mere ministerial act. See Devin v. Belt, 70 Md. 352, 354, 17 A.375, 376 (1889). The directors cannot be permitted to control the litigation by the Association against them so that the issuance of a writ of mandamus would be ineffectual. A writ of mandamus will not be issued where it would be unavailing and nugatory. See Board of County Commissioners v. Oxford Development Co., 209 Md. 373, 121 A.2d 239 (1956). See also 34 Am. Jr., Mandamus, § 37, page 830.

In considering this entire question, it should be kept in mind that the trend in the more modern authorities is to be more tolerant of the derivative suits of minority members or stockholders. The size and complexity of corporate transactions makes necessary and important this form of "legal therapeutics" to quote a phrase used by George D. Hornstein in his article entitled "Legal Therapeutics: The 'Salvage' Factor in Counsel Fee Awards," 69 Harv. L. Rev. 658 (1956). See also Hornstein, "The Counsel Fee in Stockholder's Derivative Suits," 39 Col. L. Rev. 784 (1939) and 39 A.L.R. 2d 580. The allegations of the complaint are, in our opinion, sufficient to excuse the plaintiffs from making a prior demand upon the Board and the general membership and from pursuing the remedy of mandamus against the Board.

3.

[29] We will now consider the interesting question of whether or not the complaint alleges facts which entitled the plaintiffs to the disclosure of corporate records in view of the provisions of Code (1957), Article 23, Section 51. This section provides as follows:

> "(a) *During usual business hours; what may be inspected.* – Any stockholder of a corporation may, during usual business hours, inspect and copy the bylaws, the minutes of the proceedings of the stockholders, the annual statement of the affairs of the corporation, and any voting trust agreement on file in the office of the corporation.
>
> "(b) *Holders of five percent of capital stock.* – Any one or more persons who are and for at least six months have been stockholders of record of five percent, in the aggregate, of the outstanding capital stock of any class of a corporation of this State:
>
> "(1) May, upon written request, inspect and copy, in person or by agent or attorney, during usual business hours, the corporation's books of account and the stock ledger.
>
> "(2) May present to any officer or resident agent of the corporation a written request for a statement of its affairs, and it shall be the duty of the corporation to prepare and to have available on file at the principal office of the corporation within the State within twenty days after such request, such a statement sworn to by the president or a vice-president or by the treasurer or an assistant treasurer, setting forth in reasonable detail its assets and liabilities as of a reasonably current date.

> "(3) May, in the case of any corporation which does not maintain the original or a duplicate stock ledger at its principal office in the State, present a written request to any officer or resident agent of the corporation for a list of its stockholders; and it shall be the duty of the corporation to prepare and to have available on file at the principal office of the corporation in the State, within twenty days after such request, a list containing the names and addresses of all stockholders and the number of shares of each class held by each stockholder, certified to as correct by an officer of the corporation or by the stock transfer agent or the registrar."

It will be observed that Section 51 does not purport to apply to members in a member corporation.

Code (1957), Article 23, Section 132(b), however, provides:

> "Wherever the term stockholder, holder of shares, or other equivalent words are used in this article, they shall be deemed to include members, *unless the context otherwise requires.*" (Emphasis supplied.)

In our opinion the context does clearly require a holding that it was not the legislative intent that the provisions of Section 51 include "members." Indeed, the legislative history of this section shows this.

[30, 31] At common law, a stockholder of a stock corporation, as well as a member of a member corporation, had a right to inspect corporate records, provided there was a proper purpose for the inspection. The burden was upon the stockholders or members to allege and prove this proper purpose in a mandamus action to compel the corporate officials to permit the desired inspection. 5 Fletcher, Cyclopedia Corporations (1967 Rev. Vol.) §§ 2214, 2251.

In Maryland this common law right of stockholders and of members was substantially broadened by Chapter 471 of the Laws of 1868 which provided in the then corporate article of the then existing Code, in Section 5:

> "That the President and Directors of every corporation shall keep full, fair and correct accounts of their transactions, which shall be open at all times to the inspection of the stockholders *or members* and they shall annually prepare a full and true statement of the affairs of the Corporation, which shall be certified to by the President and Secretary and submitted at the annual meeting of the stockholders or *members*." (Emphasis supplied.)

There was a similar right of inspection given by Section 67 with respect to stockholders' or members' lists.

It should be observed (1) that this broadening of the common law right included *both* stockholders and members, and (2) there was no requirement that either allege or prove that they had a proper purpose for the inspection. Our predecessors, in construing these statutory provisions, held in Weihenmayer v. Bitner, 88 Md. 325, 333, 42 A. 245, 248, 45 L.R.A. 446 (1898), a stockholder's mandamus action to compel inspection, that this right was "absolute and not made to depend upon circumstances but the ownership of the stock." The Court, however, pointed out that if the purpose of inspection was for an evil, improper and unlawful purpose the writ of mandamus might be denied *if the corporate defendant* were to allege and prove such a purpose on the part of the stockholder.

In the general revision of the corporate article of the Code in 1908 the language on which the decision of the Court in Weihenmayer v. Bitner rested was replaced with three new sections, which were Sections 47, 48 and 49 of Chapter 240 of the Laws of 1908 (Article 23, Sections 72, 73 and 74 of the 1911 Code):

"Stockholders' Rights.

"Demanding Statement

"Sec. 47. If any person or persons owning in the aggregate five per cent of the outstanding capital stock of any corporation of this State (or five per cent of any class of such stock, if two or more classes have been issued), shall present to the president or treasurer a written request for a statement of its affairs, it shall be his duty to make such a statement under oath, embracing a particular account of its assets and liabilities in detail, and to have the same ready and on file at the principal office of the corporation within twenty days after the presentation of such request. And such statement shall at all times during business hours be open to the inspection of any stockholder, and he shall be entitled to copy the same. And if such president or treasurer to whom such request shall be delivered, sh[illegible] neglect to filesuch statement, he shall forfeit and pay to the person presenting the request the sum of fifty dollars for each and every day's delay; and if he shall refuse to permit any stockholder to inspect such statement and copy the same, he shall forfeit and pay to such stockholder the sum of fifty dollars for each and every refusal.

"Inspection of Books.

"Sec. 48. The books of every corporation of this State, including such books as show the names of the stockholders thereof, and their places of residence and the number of shares held by them, shall during the usual business hours of every business day be open for the inspection of any person or persons holding in the aggregate five per cent of the outstanding capital stock, or five per cent of any class thereof, if two or more classes have been issued, at its principal office in this State; every officer or agent of any such corporation who shall refuse to exhibit the same, shall be guilty of a misdemeanor, and the corporation shall forfeit and pay to the stockholder demanding such inspection the sum of fifty dollars for every such refusal.

"Duties and Liabilities of Directors

"Accounts and Statements

"Sec. 49. The directors, managers and trustees of every corporation of this State shall keep full and fair accounts of their transactions; and they shall annually prepare a full and true *statement* of the affairs of the corporation, which shall be submitted at the annual meeting of the *stockholders or members*.'" (Emphasis supplied.)

It is significant that this change in the corporation laws in regard to the five per cent requirement for stockholders providing for the preparation and filing of a corporate statement, with a penalty upon the president and treasurer for non-compliance and providing for the inspection ~~of~~ the corporate books, including the stockholder's list, with a criminal sanction on the officers and agent of the corporation and a $50 penalty on the corporation for refusal, applied only to *stockholders*, with no mention of "members," but Section 49 in regard to the submission of the annual statement provided that it should be submitted at the annual meeting of the "stockholders *or members*."

The deliberate inclusion of "stockholders" in Sections 47 and 48 and the exclusion of the words "or members" in these sections (but their inclusion in Section 49) indicates to us that it was not intended that the five per cent restriction was intended to apply to "members" or to "member corporations." This is not only clear from the language of the statute itself, but also from the purpose of the five per cent restriction. This five per cent restriction was to prevent *an abuse* of the common law right of a single stockholder to demand inspection of books, etc., with possible attendant substantial expense, when the amount of the stock holding was insignificant compared to the whole stock structure. It was, in short, to prevent "strike" suits by litigious stockholders holding less than five per cent of the corporate stock of a class of corporate stock. Generally stock in a stock corporation may be purchased by any one at any time without the prior consent of the other stockholders or of the board of directors of that type of corporation. The business reasons underlying the five per cent limitations are not generally present in a "member" corporation which has no shares to be purchased by any one at will and without the approval of the board of directors or of the members. In member corporations generally and in the Association, membership is not freely bought or sold. On the contrary a member is admitted to membership by the Board and, quite unlike the holder of shares in a stock corporation, has only *one vote* regardless of this capital investment in the milk producing business. This relationship is far more analogous to partnership than it is to the holding of stock in a stock corporation. "Membership" must be granted, not freely acquired by purchase, each member has one vote, and death would terminate the membership, as there is no provision for succession of the membership to the personal representatives or assigns of the member. In short, the purpose of the five per cent limitation does not apply to a member in a members corporation such as the Association and we are of the opinion that the General Assembly did not intend that that limitation apply to a member. The member in a member corporation continuted to have his right of inspection without the five per cent limitation. We do not need to decide whether his common law right of inspection or his statutory right of inspection under Chapter 471 of the Acts of 1868 continued, as under either assumption, the five per cent limitation did not apply and under the allegations of the complaint it appears that the purpose of the demand for inspection was an entirely proper one intended for the ultimate benefit of the Association itself.

In Wight v. Heublein, 111 Md. 649, 75 A. 507 (1910), our predecessors, in a case involving a demand by a stockholder owning more than five per cent of the corporate stock in a distilling company, did not find it necessary to decide the nature of the stockholder's right of inspection as the answer of the corporation to the mandamus petition clearly indicated an improper motive on the part of the petitioner-stockholder in seeking the inspection of the corporate books and records. As there was a demurrer to the answer which admitted for the purpose of the demurrer the improper purpose, it was held that the trial court improperly overruled the demurrer to the answer. In Jackson v. Hopkins, 113 Md. 557, 78 A. 4 (1910), the Court had before it a mandamus action filed by an alleged vestryman of an Episcopal Church established under the Vestry Act (Act of 1798, Chapter 24) to inspect the records of the church. In the answer to the petition for a mandamus it was denied that the petitioner was a vestryman and the Court held that the demurrer to this portion of the answer was properly overruled. It was then contended, however, by the petitioner that he was a *member* of the church and, as such, had the right of inspection. The Court assumed, without deciding, that the petitioner as a member of the church, established under the Vestry Act "may ordinarily have standing in a court of law to ask for a mandamus to require" the person having custody of the books of the church "to permit him to inspect them." It was not necessary to decide this issue, because, in any event, the answer to the petition alleged that the petitioner as such a member had established a "competing" Sunday school in definance of the ecclesiastical authority of the church and desired the inspection for an improper purpose. We think it is significant, however, that the Court did not mention the five per cent requirement in the then recent Act of 1908, Chapter 240 as even possibly being applicable to a member in a member corporation, thus indicating that the Court did not think that it was so applicable.

Sections 72, 73 and 74 of the 1911 Code (Laws of 1916, Chapter 596, previously enacted by Chapter 240 of the Laws of 1908) were amended by eliminating the provisions declaring the refusal to be a misdemeanor and the penalty of $50 for each refusal to comply with the request of a five per cent holder of the corporate stock. In 1927, by Chapter 581 of the Laws of 1927, there were unimportant amendments requirng that the corporation at the request of five per cent or more of the stockholders prepare and have on file at its principal office in the State a list of stockholders if the original or duplicate stock ledgers were not kept at such principal office. The only change thereafter prior to the institution of suit in the present case occurred in the general revision of Article 23 of the Code by Chapter 135 of the Laws of 1951 which enacted what is now Article 23, Section 51 of the 1957 Code, already set out above in full. It will be observed that there has been no change in the important language in regard to the applicability of Section 51 since the passage of the Act of 1908, Chapter 240, so that the legislative intent that the five per cent requirement should not apply to members of member corporations has continued until the present time. Each plaintiff as a member of the Association was, therefore, entitled to examine the books and records of the Association, including the list of the general membership and the full Dugan Report.

[32, 33] In regard to the Dugan Report, it was indicated by officials of the Association that Professor Dugan gave a "confidential" report and to allow the plaintiff members to see it would breach this "confidence," and, in any event, the plaintiff members would use the report to place its contents in the press and thereby injure the Association. The difficulty with the first contention is that when the Dugan Report was given by Professor Dugan as an attorney to his client the report lost whatever "confidential" character it might otherwise have had. There can be no confidential nature of an attorney's report to his client so far as the client is concerned. The confidence restricts disclosure by the attorney without the client's consent; it does not restrict the client. This is clearly the case when the report involved is intended to form the basis of possible future action by the client, as was the

situation in the present case. Then too, the client had already issued what purported to be the "substance" of the Report to the members so that any confidential quality of the Dugan Report had been dissolved by this action by the Association. Any member after that action had the right to inspect the original Report to see whether the Board had in fact made a full, objective summary of the Report or had possibly omitted portions of it unfavorable to the Board and indicating possible liability of the directors. The reluctance of the Board to exhibit the original Report under all of the circumstances alleged in the complaint indicates the reasonableness on the part of the plaintiffs, as minority members, in insisting on seeing the full Report. Nor can the excuse given by the Board or its representatives that the material would be used by the plaintiffs for publicity purposes in the newspapers to the injury of the Association be thought valid in view of the fact that the plaintiffs already had what the Board represented to be the substance of the Report and whatever publicity would come from the facts thus summarized had either occurred or was within the power of the plaintiffs to make it occur. In short, if the representation that the Statement of Fact (exhibit G) was a true and correct summary of the Dugan Report was correct, the plaintiffs already had the basic information and whatever damage the Association could suffer from publicity had either occurred or the danger would not be increased by showing a copy of the Dugan Report to the plaintiffs. In our opinion they were entitled to see it.

In view of our opinion that the complaint sufficiently states causes of action against the defendant directors without having seen the full Dugan Report, we need not consider whether under the unusual circumstances of the present case, the plaintiffs would be confined to the usual remedy of mandamus to compel the Association, its officers and agents, to show them the requested books, records and report. Doubtless by appropriate discovery proceedings the plaintiffs will be able to obtain the production of those books, records and report. Nor do we need to consider whether or not the allegation in paragraph 26 (g) of the complaint that "Complainants Parish also sought and obtained the signatures of more than five per cent of the members on petitions requesting access to the books and records of the Association but said request was denied as not being in proper form" is a sufficient allegation of compliance with Article 23, Section 51, assuming, *arguendo,* that Section 51 would apply to demands of inspection of members as well as to such demands by stockholders.

4.

We are of the opinion that the claims against the defendant directors which arose more than three years prior to the time suit was filed are not barred by laches.

[34] The suit in the present case was filed on February 4, 1965. The defendant directors urge upon us that the three year statute of limitations established by Code (1957), Article 57, Section 1 is applicable to transactions which arose more than three years prior to that date of which the plaintiffs had notice and could and should have investigated more promptly and in time to have filed the complaint within the three year period. There are two answers to this contention. One is that in paragraph 27 of the complaint the plaintiffs allege that there was fraudulent concealment of the principal causes of action by the defendant directors and the plaintiffs did not, and reasonably could not, discover the existence of the causes of action prior to late in 1963 or early 1964, well within the three year period from the discovery of the causes of action and the time of filing suit. It is provided by statute that where an adverse party keeps a party in ignorance of the cause of action by fraud, the right to bring suit will be deemed tohave first occurred when the fraud was, or with usual and ordinary diligence might have been known or discovered. Code (1957), Article 57, Section 14. See Brack v. Evans, 230 Md. 548, 187 A.2d 880 (1963). The complaint, on its face, similarly shows no lack of diligence on the part of

the plaintiffs in seeking to discover any possible causes of action against the defendant directors and other parties.

[35] The other answer is that there is nothing in the allegations of the complaint to show that the defendant directors have suffered any prejudice or disadvantage by the delay in filing suit, so that the doctrine of laches does not apply regardless of the passage of more than the statutory period or of an unreasonable time. Spangler v. Dan A. Sprosty Bag Co., 183 Md. 166, 176–177, 36 A.2d 685, 690 (1944), quoting with approval from 4 Pomeroy, Equity Jurisprudence, § 1440 (Third Ed. 1906) as follows:

> "Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law, but when, knowing his rights, he takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be enforced, delay becomes inequitable, and operates an estoppel against the assertion of the right."

5.

We have concluded that the matters complained of in the complaint are not barred by the doctrine of *res judicata* as to those defendant directors whose demurrers were sustained without leave to amend.

This interesting question arises by prior rulings on prior bills of complaint filed by the plaintiffs. Judge Shook after hearing argument on the demurrer of the defendant director King to the second amended bill of complaint, passed an order on December 13, 1966, sustaining his demurrer without leave to amend. On the same day the docket entries indicate that Judge Shook sustained the demurrers of the defendant directors Marty, Weitzer, Fouche, Adams and Stull, but there is no indication one way or the other in regard to whether leave to amend was granted. No appeals were taken from these orders to this Court within thirty days. On February 13, 1967, however, as we have already indicated, Judge Pugh passed an order dismissing all motions, demurrers and other pleadings without prejudice and directed the plaintiffs to file a third amended bill of complaint. This third amended bill of complaint was filed by the plaintiffs on February 28, 1967, and is the complaint principally involved in the present case.

The seven defendant directors, however, contend that the prior rulings on demurrer were *res judicata* and preclude the plaintiffs from proceeding against them in the third amended bill of complaint. They argue that Maryland Rule 373 d provides (as it does) that Section e of Rule 345 (e) provides that an order sustaining a demurrer to an entire declaration (bill of complaint) without leave to amend shall be deemed to include and constitute a final judgment for costs for the demurring party; that a judgment on demurrer, in view of our decision in Moodhe v. Schenker, 176 Md. 259, 4 A.2d 453 (1939), may, if made on the facts alleged and not upon technical considerations, be a judgment on the merits which will support a subsequent defense of *res judicata*; and, that since the record in the present case contains the second amended bill of complaint and the rulings on demurrer, the plaintiffs are barred in the third amended bill of complaint by the doctrine of *res judicata* as to the same or similar matters which were raised or could have been raised in the second amended bill of complaint.

The difficulty with this contention is that Maryland Rule 605 (a) requires a different result. Rule 605 (a) provides:

> "Where more than one claim for relief is presented in an action, *whether as an original claim,* counter-claim, cross-claim, or third-party claim, the court may direct

> the entry of a final judgment upon one or more but less than all of the claims *only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.* In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims." (Emphasis supplied.)

[36,37] This rule applies to suits in equity as well as to action at law. There can be little doubt that all of the bills of complaint filed in this case involved multiple claims, *i.e.*, (1) an accounting to the Association for the profits derived by Hooper and Robinson, (2) a determination and decree that each of the defendant directors and the auditor of the Association are jointly and severally liable for losses to the Association resulting from their fraud, concealment, gross negligence, illegal conduct, waste of corporate assets and conspiracy to conceal losses by issuing false and misleading reports, (3) a declaratory decree cancelling and setting aside the general release to Hooper and Robinson, (4) relief in the nature of the appointment of a receiver to institute appropriate suits against others beyond the court's jurisdiction and (5) other relief.

Where multiple claims are involved, as in the case at bar, it is required by Rule 605 a that the trial court *may* direct a final judgment upon one or less than all of the claims, but *only* upon (a) an express determination that there is no just reason for delay and (b) upon an express direction for the entry of judgment. The rule further provides that in the absence of such determination and direction *any order* or form of decision, *however designated,* which adjudicates less than all the claim shall not terminate the action as to any of the claims.

In regard to the King order which sustained his demurrer "without leave to amend" there was no *express determination* that there was no just reason for delay and no *express direction* to enter judgment for costs. The provision in Rule 345 e that the sustaining of a demurrer without leave to amend *shall be deemed* to include and constitute a final judgment for costs does not amount to an *express direction* by the trial court for the entry of judgment for costs required in multiple claim cases under Rule 605 a.

The demurrers of the remaining six defendant directors were merely "sustained," without an indication of whether there was leave to amend or not. There was no express determination that there was no just reason for delay or an express direction to enter judgment for costs. The order was therefore not a termination of any of the claims of the seven defendant directors mentioned.

The present case illustrates the wisdom of Rule 605 a which was designed, as was Rule 54 (b) of the Federal Rules of Civil Procedure (Maryland Rule 605 a is identical with Federal Rule 54 (b)), "to prevent piecemeal appeals as far as possible, and thereby avoid the confusion, delay and expense which would be caused by having two or more appeals in the same suit.". Durling v. Kennedy, 210 Md. 549, 554, 123 A.2d 878, 880 (1956). See Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 76 S.Ct. 895, 100 L.Ed. 1297 (1956); Southern Parkway Corp. v. Lakewood Park Corp., 106 U.S.App.D.C. 372, 273 F.2d 107 (1959); Atkins, Kroll (Guam), Ltd. v. Cabrera, 277 F.2d 922 (9th Cir. 1960).

6.

[38] Paragraph 1 (a) of the complaint alleges that the plaintiff, Mrs. Parish, was enrolled as a member of the Association in 1941, and operated Thorndale Farm as a member from that time until 1957, selling milk to the Association. From 1957 to 1961 the farm was operated in the

name of Schott Brothers under lease from Mr. and Mrs. Parish, but this lease under the Certificate of Incorporation of the Association did not deprive the plaintiffs Parish of their continued membership during that period, but, on the contrary, required it. Thereafter Mr. and Mrs. Parish executed the October 9, 1961 contract with the Association which is filed as part of the complaint as exhibit B. It is alleged that they continuously so operated the farm from 1961 "until the bona fide sale of their cowherd in the spring of 1966." There is no allegation that Mr. and Mrs. Parish are no longer members of the Association.

The Association, however, urges upon us that Mr. and Mrs. Parish have no standing as "a former member" to maintain the derivative action in this case on behalf of the Association. It relies upon the well recognized rule that a *stockholder* in the usual stock corporation cannot sue unless he is a stockholder at the time the derivative suit is instituted or if he transfers his stock, *pendente lite,* he has no further right to maintain the suit. This rule is founded upon the theory that the very interest a stockholder has in the corporation is represented by his holding of the stock of the corporation and when he transfers this interest to another, his interest ceases and passes to the transferee of the stock. Membership in the Association is not negotiable or transferrable by the member to another person. Although it is true as the Association points out that in order to be eligible for admission as a member the "person, firm or corporation must be engaged in dairying or owning or leasing land on which dairying is carried on and sharing in the products therefrom," and upon admission such member "shall have voting power and property rights therein on the same basis as all other members" as provided in Article XIV (b) of the Certificate of Incorporation, there is no provision in the Certificate, of Incorporation which indicates that the sale of a cowherd, *ipso facto,* results in a cancellation of existing membership. The remaining provisions of Article XIV indicate the contrary. For example, in the remaining portion of

Subsection (b) itself, there is a provision that if a partnership is admitted to membership and is dissolved, each co-partner who continues to produce milk as an individual shall succeed to individual membership, and the outstanding membership to the dissolved partnership * * * shall be cancelled" and each individual shall be entitled to receive and shall accept an individual membership certificate without further fees.

Subsection (d) provides that a member who fails to remain qualified as provided in Subsection (b) "shall not be entitled to vote or hold office or participate in any of the benefits of the Association until said qualifications shall be restored * * *." There is also a provision that any member so qualified "who shall fail to market all milk produced or acquired by or for him in compliance with the terms and provisions of the marketing agreements, referred to in subsection (b) of Article XIV hereof, and then in force, shall not cease to be a member hereof unless and until the Board of Directors, by a majority vote, passes a specific resolution to that effect."

So far as the allegations of the complaint and the provisions of exhibit C (the Certificate of Incorporation) are concerned, there is nothing to show that Mr. and Mrs. Parish are not still members of the Association. Subsection (d) of Article XIV indicates that the failure to remain qualified only results in the loss of the right to vote, hold office or participate in the benefits of the Association until qualification is restored, not that membership is discontinued or that prior accrued benefits are forfeited. Even when there is a *violation* of a marketing agreement, the member is not automatically expelled from membership, but a specific resolution of the Board by a majority vote is required for the expulsion of a member. Assuming, without deciding, that the loss of membership in the Association would terminate the right to maintain a derivative suit on behalf of the Association, there is nothing on the face of the complaint or exhibits to indicate that the plaintiffs Parish are not still members of the Association and as such are entitled along with the other plaintiffs to maintain the derivative suit.

7.

The Association urges that the plaintiffs Parish, "who instituted the proceedings in their status as a single member of the Association," had no standing to maintain the derivative suit with respect to actions complained of prior to October 9, 1961, when they signed their contract with the Association, upon the analogy to stockholders in a stock corporation. Our predecessors have held that stockholders must have been such at the time the alleged wrongful acts injuring the corporation took place in order to bring a derivative suit on behalf of the corporation to recover for damages resulting from those wrongful acts. Eisler v. Eastern States Corp., 182 Md. 329, 35 A.2d 118 (1943); Matthews v. Headley Chocolate Co., 130 Md. 523, 100 A. 645 (1917); Brune, Maryland Corporation Law and Practice, §251, p. 257, §252, p. 260 and §255, p. 271.

[39,40] Assuming, without deciding, that the members in a member corporation like the Association would by analogy be subject to the rule applicable to stockholders in a stock corporation, the doctrine would not be applicable in the present case inasmuch as paragraph 1 (a) of the complaint alleges that Mrs. Parish was a member of the Association since 1941, signed an agreement with the Association on November 18, 1942, operated Thorndale Farm until 1957, then leased the farm, during which time Mrs. Parish's individual ownership was changed to a joint tenancy with her husband and after the termination of the lease, the joint tenants, Mr. and Mrs. Parish, as members, executed the agreement with the Association of October 9, 1961. In view of the law that joint owners, and certainly tenants by the entireties, hold *per my et per tout* (see 2 Tiffany, Real Property, § 418, § 430 (3rd ed.)), the mere change of individual ownership to joint ownership would not deprive the right of the joint owner to

maintain a derivative suit on the part of the Association for wrongful acts arising after 1941, which all of the wrongful acts do in the present case.

8.

[41–44] The executors of the estate of Robinson contend that the complaint does not allege facts which would justify the court in setting aside the general release executed and apparently delivered to Robinson by the Association in 1964. We disagree. Ordinarily a defense based upon a release is complete. A release, however, is a contract and may be set aside for the same reasons for which any other contract may be avoided. Thomas v. Erie Insurance Exchange, 229 Md. 332, 182 A.2d 823 (1962). If the release is obtained by fraud, it may be set aside for this reason. Spitze v. Baltimore & O Railroad Co., 75 Md. 162, 23 A. 307 (1892). In addition to actual fraud, which is not alleged in the complaint, when the release is challenged, a party to it who stands in a confidential relationship to the other party has the burden of showing that the release was not obtained by fraud, undue influence or over-reaching. See Indurated Concrete Corp. v. Abbott, 195 Md. 496, 74 A.2d 17 (1950).

[45] In our opinion, the complaint alleges sufficient facts to indicate, *prima facie,* that Robinson, as well as Hooper, did stand in a confidential relationship to the Association and they have the burden of establishing that the general release given by the Association to them in 1964 was not obtained by their fraud, undue influence or over-reaching. It may be that either Robinson or Hooper, or both, may be able to allege in their answers and prove at the trial of the case on the merits that the general release was obtained in an arms-length transaction, untainted by fraud, undue influence or over-reaching on their part and when the Association had, or should have had, a full and complete knowledge of the relevant facts concerning the matter, but the burden of showing all of this is upon Robinson and Hooper.

We now consider the allegations in the complaint which establish, *prima facie,* the confidential relationship of Hooper and Robinson to the Association.

In paragraph 20(a) it is alleged that the facts appearing in the statement of fact in the Special 1964 Report attached as part of the complaint as exhibit G are correct and these facts are adopted by the plaintiffs as their own. In exhibit G, it appears that Hooper was first employed by the Association in 1935 as accountant and office manager. He became general manager and secretary-treasurer in 1956. In his contract of employment as general manager he was given "the usual powers of a general manager of an enterprise including general power, under the supervision of the Board of Directors, *to conduct the affairs of this Association,* such powers to include general control *over the buying and selling* of the Association's products * * *." (Emphasis supplied.) Robinson was, with his then partner Berman, employed in 1955 as manager of the manufacturing division at the Laurel Plant. Later Berman withdrew and Robinson was sole manager. The Laurel Plant had been purchased from Robinson and Berman and in Robinson's employment contract with the Association he was obligated to "give * * * the same executive direction and the same skilled management that he had theretofore given the operation of said business."

It further appears in exhibit G that Hooper and Robinson arranged the Harrison affair together and placed the stock of Harrison in the names of their respective children and Hooper's wife, Hooper and Robinson acting as voting trustees of the stock. Even after the Board discovered the fraudulent and illegal activities in connection with Harrison, it did not investigate either Hooper or Robinson, but on the contrary agreed in April, 1962, to purchase Harrison from the two wrongdoers for $81,341.27 in order to "eliminate any possible area of conflict of interest." In paragraph 18(e) this price is alleged to be "an excessive price," and it is further alleged in paragraph 18(c) that Hooper and Robinson had between them diverted in excess of $1,300,000 worth of gross business from the Association's Laurel Plant, managed and controlled by Robinson, to the Harrison operation in Florida. In exhibit G, it appears that Robinson was *"sole-salesman"* for both Harrison and the Laurel Plant.

In the latter part of 1961, exhibit G indicates, Robinson made the "deal" with Weldon, whereby Weldon would buy skim milk powder at the new Oneida plant to be erected by Mutual, referred to in exhibit G as "Robinson's corporation." The same type of "Harrison operation" was engaged in by Robinson so that "Mr. Robinson's Mutual Milk Sales Packaging Division received a very substantial brokerage fee or price differential in their sales." Mutual, Robinson's corporation, bought skim powder from the Association's Laurel Plant, of which Robinson was manager, for $800,452.68 and resold the product to Weldon for $946,318.42, the shipments being made directly from the Laurel Plant to Weldon in New York. The gross profit to Mutual on the bookkeeping entries was $100,256.28. It is significant that it appears in exhibit G that even after the discovery of the unlawful conduct of Robinson, the Association never did receive the Mutual books to show the exact figures in regard to the mark-up, although these books were demanded by counsel for the Association provided by Robinson. There was no investigation of Hooper or Robinson until Click, the assistant secretary, tendered his resignation on November 8, 1963, and presented his charges against Hooper. Professor Dugan was retained on December 4, 1963, and even after his Report was presented to the Board containing the detailed facts in regard to the misconduct of Hooper and Robinson, Hooper was removed by the Board as general manager and secretary-treasurer on February 12, 1964, Hooper even then maintaining that the matters disclosed did not justify termination of his contract and there was a significant division in the Board in regard to this matter. Robinson's contract had expired and was not renewed.

It is alleged in paragraph 20(a) that Robinson participated in each breach of trust by Hooper and Hooper in each breach of trust by Robinson, they having conspired between themselves to misappropriate corporate assets.

In paragraph 18(g) it is alleged that Robinson and Hooper caused the Association to pay excessive compensation to Robinson, amounting in one year to over $130,000; in paragraph 18(h) that they caused the Association to employ inexperienced and incompetent relatives of Hooper and Robinson in positions of trust in the Laurel Plant and elsewhere in the employ of the Association. Even after the termination of Hooper's employment, it is alleged in paragraph 27(a) that the public relations official of the Association issued a circular letter complaining of the termination on the ground that Hooper's actions were done with the full knowledge, consent and approval of the Board. In addition it is alleged that after the transaction the Board and the auditor conspired to conceal the true facts in regard to the derelictions of Hooper and Robinson.

[46] From all of these facts the reasonable inference is that Hooper and Robinson were in actual control of the operations of the Association and dominated and controlled those operations. The Board relied upon them implicitly, trusted them completely and were guided by them in regard to the Association's affairs. Because of all these facts and circumstances, Hooper and Robinson stood in a position of such confidence and trust to the Board and to the Association that they and each one of them had the burden of showing that transactions between them were free from the taint of fraud, undue influence or over-reaching. In short, under the facts and circumstances alleged and the reasonable inferences from those facts and circumstances, Robinson (as well as Hooper) has the burden of showing that the general release was fair, free from fraud, undue influence and over-reaching, and that the Association executed the general release with full knowledge of the applicable facts. By the facts appearing in

exhibit G, already referred to above, it is clear that so far as Robinson is concerned, the Association did not receive the Mutual books, demanded by the general counsel of the Association, prior to the execution by the Association of the general release. It thus appears, *prima facie,* that the Association did not in fact have full and complete knowledge of the amounts and details of Robinson's misconduct in the Mutual transaction at the time the general release was executed. It is clear from the authorities that a general release of a person standing in a fiduciary relation to a corporation does not release such a person even though the official relationship of that person to the corporation has been terminated in substantial time prior to the execution of the release. There still must be a full and frank disclosure by the person in the fiduciary relationship in order to sustain the effectiveness of the release. Irving Trust Co. v. Deutsch, 73 F.2d 121 (2d Cir. 1934). See Stevens v. Marco, 147 Cal. App. 2d 357, 305 P.2d 669, 684–685 (1956). Cf. Hawker v. Worley, 33 F.2d 491 (8th Cir. 1929).

[47] The plaintiffs alleged in paragraph 20 that Hooper and Robinson were constructive trustees, or trustees *ex maleficio*, of all the assets, funds and property obtained by them by their breaches of trust and that (a) they could not by paying back part of the misappropriated property extinguish the Association's equitable title to the remainder by the "so-called release" which is void as obtained by them for an inadequate consideration, and (b), in the alternative, they, as such constructive trustees, have the burden of showing that the release was fairly obtained. In our opinion, however, the burden of showing the bona fide circumstances surrounding the obtention of the release is upon Robinson (and Hooper) not because they are constructive trustees but because, as we have indicated, they, *prima facie*, were in a position of confidential relation with the Board and the Association.

9.

The executors of Robinson also contend that the complaint is multifarious as to Robinson. Again we do not agree.

[48] The Maryland Rules have sought to liberalize the prior common law and equity rules in regard to the joinder of parties and of claims in one action. Rule 313 d permits the joinder of separate claims involving different plaintiffs or defendants or both whenever any substantial question of law or fact common to all claims "or for any other reason the claims may conveniently be disposed of in the same proceeding." The defense of multifariousness still may be raised and be effective in certain cases, see Rule 283, but, in our opinion, the present case is not one in which the defense of multifariousness can be successfully made.

The executors for Robinson point out that some of the transactions alleged in the complaint arose prior to Robinson's employment by the Association and that Robinson's estate should not have the trial of those claims combined with the claims against him with attendant delay and expense. The allegations in the complaint, however, are such that all of the transactions alleged have some connection with the others alleged in the complaint. Hooper and Robinson are charged with conspiracy to misappropriate corporate funds and each allegedly participated in themisconduct of the other. Their confidential relationship with the Board and the Association make relevant all matters in which Robinson took the leading part. It would be far more inconvenient to attempt to separate the transactions in which Robinson apparently played the leading part and the claims against him from the other transactions and claims than it would be to consider all of the claims in one case, especially when all of the claims are tried in an equity suit before the Chancellor. In other words, it is our opinion that all of the claims "may conveniently be disposed of in the same proceeding" and, hence, all of the claims may be joined in the present suit in accordance with the provisions of Rule 313 d. See Martin v. Carl, 213 Md. 564, 132 A.2d 601 (1957), Townsend v. Morgan, 192 Md. 168, 63 A.2d 743 (1949).

For all of the reasons stated, the order of the Chancellor sustaining the demurrers of the various parties without leave to amend must be reversed and the case remanded to the lower court so that the parties defendant may file their answers and that further proceedings may be had in regular course.

Order reversed, case remanded for further proceedings in accordance with this opinion, the costs to be paid as follows: One-half of the costs to be paid by the appellee, Maryland and Virginia Milk Producers Association, Inc., and the remaining one-half of the costs to be paid in equal parts by the appellees other than Maryland and Virginia Milk Producers Association, Inc.

HAMMOND, Chief Judge (concurring in part and dissenting in part.)

I have considerable doubt that the allegations against any defendant other than Hooper and Robinson sufficiently charge fraud or the gross and culpable negligence in discharge or omission of duties necessary to make him liable, but I bow to the contrary views of my brethren on this point. As to Robinson and Hooper during their periods of employment by the Association, fraud or breach of a fiduciary duty may well have been alleged but to me it clearly appears that the release given them when they were no longer employed was negotiated and executed in good faith at arms length, after full knowledge of all the facts had been obtained by the Association from the Dugan report, and that it is unassailable as far as they are concerned. This is to say that fraud and breach of fiduciary duty that tainted the transactions that led to the release may have been alleged, but that there is no sufficient allegation that fraud or other invalidating agent played any part in its obtention or execution. In my view, Hooper and the executors of Robinson should be let out.

MOTION TO MODIFY INJUNCTION
(Filed July 11, 1969, denied
September 11, 1969 (p. 20))

Frank P. Parish and Theodore F. Parish, Complainants, in proper person, move pursuant to Maryland Rule BB79 for rescinding of the restraining and injunctive provisions of the order of the Court dated December 4, 1968. The grounds of the Motion are as follows: said order sought to be dissolved prohibits the parties to this cause from making public the contents of the DUGAN REPORT, and other findings resulting from pre-trial discovery.

1. Professor Dugan was employed by the Plant Committee of the Association pursuant to a letter dated December 4, 1963 from Mr. Giles Miller, Chairman of the Plant Committee. Professor Dugan was to investigate certain facts regarding the management and operation of the said Association;

2. Professor Dugan heard the testimony of the nineteen (19) witnesses, examined hundreds of pages of files and documents and the record shows 1467 net pages of testimony were taken. Selections from which are submitted herewith as Exhibits and prayed to be made a part hereof.

3. Quoting Professor Dugan's comments from Page 2 of the said report, Exhibit A:

> ". . . this investigation has been done under tremendous pressure because of the time limitation set forth by the Plant Committee in order to have a report in your hands and in the hands of the Board

> of Directors before the annual meeting of the Association. Therefore, you must understand that this report was written on Sunday, February 9, 1964, and on Monday, February 10th, after I had taken the last testimony of Mr. Robinson and Mr. Hooper on Saturday."

One can readily appreciate that Professor Dugan was under a great burden insofar as the time allotted to him to prepare an adequate report or to make an investigation worthy of the name – which he did, but by his own comments, said investigation is incomplete.

Page 19, Exhibit A, he states: " – it appears from this audit of Harrison Dairy Products by Wayne Kendrick & Company (Exhibit B) that old customers of the Association show up on the books of Harrison Dairy Products as their customers, but that sales of the dairy products were made directly to the customers without going through the Jacksonville operation at all".

"Secondly, Harrison Dairy Products shows new customers on their books, but the facts appearing in the audit indicate that sales were made to these new customers, directly from Laurel and they did not go through the Jacksonville plant."

4. This corporation was owned by Hooper, Robinson, and their families; it was formed May 8, 1961, by William J. Hughes, Jr., then general counsel for the Maryland and Virginia Milk Producers Association, Inc.; (Exhibit C)

Hooper, Robinson and Hughes were its three (3) directors; (Hooper being the Association's Secretary-Treasurer and General Manager; Robinson being its Manager of the Laurel Plant.)

The special examination of Harrison by auditors, Wayne Kendrick & Company, dated January 31, 1964, attached hereto, Exhibit B, shows that this corporation;

> *had no capital*; (stock was subscribed for in the amount of $900, but not paid for).

By March 31, 1962, ten (10) months after it was incorporated;

> $369,000 credit had been extended Harrison by the Association to finance Harrison's:

$135,745	Cash in Bank
68,370	Undeposited Receipts
4,700	Inventory
194,963	Accounts Receivable
39,418	Fixed Assets
10,190	Reserve for Taxes

They were almost totally operating on the credit of the Maryland and Virginia Milk Producers Association.

During these same ten (10) months, checks in the amount of $17,656 were issued to employees of Maryland and Virginia Milk Producers Association, Inc., and their relatives; $9,000 dividends paid to stockholders; and there was $32,700 surplus as of March 31, 1962.

5. After the above came to light, the Association agreed to purchase the stock of this company for $81,341. The valuation is shown as $33,641. 72 in the Balance Sheet, March 31, 1962, (see Exhibit B & C, to Exhibit B).

Statement by Enrest C. Clifford (auditor), Pages 33-34: (See Exhibit D, Pages 101-102):

> Mr. Dugan: "Did you realize at the time that there was a conflict of interest there?"
>
> Mr. Clifford: "I certainly did, and so did our office understand it that way; and we could not understand what in the hell they were trying to do."

6. Further quoting Mr. Dugan (Page 49, Exhibit A) in connection with Harrison Dairy Products Company: "It should be noted that statements have been made that the profits of the Jacksonville Plant, since its purchase by the Association, has already paid for the Plant. However, this statment should be taken with a grain of salt - - - ."

7. Quoting Dugan, Page 19 and 20, Exhibit A: "It would therefore appear that the general counsel of the Association should take appropriate steps to recover from the individuals involved the amount of money which the Association should have made, had Harrison Dairy Products not existed insofar as these sales are concerned . . ."

8. Page 48 and 49, Exhibit A: "I was unable, due to the pressures of time and the number of matters before me, to visit the Jacksonville Plant. However, it is apparent from the sales that are being made by that Plant and from the testimony of a former employee, that this Plant at the present time does very little. I would recommend that an audit be made of that present operation."

9. Page 26, Exhibit A. Further quoting Dugan: "Mr. Robinson testified that he had talked over the price that the Association would get for the sale s to Mutual Milk Sales Packaging Division. It would appear from the analysis that Wayne Kendrick has made of the first *invoices* of Mutual Milk Sales Packaging Division, that the Association sold some $80,000 worth of powder skim to Mutual Milk Sales Packaging, and that this skim powder was delivered directly to Weldon Farms Dairy, and that Mutual Milk Sales Packaging which was owned by Robinson and Berman, made a gross profit of $100,000 on this bookkeeping entry."

It must be kept in mind that the above deals only with the *invoices* which were disclosed. The books of Mutual were never produced.

10. Page 26-27. "I therefore recommend that the general counsel of the Association take appropriate action to recover from Mutual Milk Sales Packaging Division and Mr. Robinson, the $100,000 gross profit which Mr. Robinson and his partner made out of this transaction or any figure which an investigation of the law of damages in a transaction of this kind shows to be proper."

10½. THE FACTS AS TO MR. HOOPER'S KNOWLEDGE

Still quoting Professor Dugan,

10½./Page 27, Exhibit A. The monthly price list, which includes the names of customers which were supplied to Mr. Hooper monthly, first of all, show that these sales made to Mutual Milk Sales Packaging Division were at prices that were consistently below the Government support price - - - ."

11. Page 48, Exhibit A. "Furthermore, the minutes of the Plant Committee reveal that they did not keep the Board of Directors informed as to what was going on in the Laurel Division, and that this matter should be corrected immediately. *In truth, the minutes of the Plant Committee are completely useless.* These [redacted] as a matter of good business, should show the major [redacted] the Laurel Division and what action the Plant Committee recommends to the Board of Directors."

12. Page 57, Exhibit A. "An examination of the Board minutes of the last two years, on a page-by-page basis reveals that they disclose little of the major actions of the Association, and practically nothing of the Laurel operation. They seem to be more concerned with the minutes of who paints the parking lot, or whether chairs are upholstered. It is recommended that the minutes reveal all substantial matters concerning the Association, including the Laurel operation, and that the matter of taking the minutes be drastically revised."

13. Page 61, Exhibit A. "Mr. Click did raise the question as to whether Mr. Robinson had an interest in the companies that handled the products of Laurel or Onieda, and there Mr. Hooper told him that Mr. Robinson had an interest in Weldon Farm Products, but that he could see there was no conflict there between the Association and Mr. Robinson. From the evidence disclosed in the audit, of course, this answer of Mr. Hooper's was incorrect, and it seems to me that Mr. Hooper was specifically put on notice by this inquiry of Mr. Click's."

14. Some understanding of the intent to conceal will be found in the Minutes of Committee Meetings and Director Meetings. See statement by Hooper, Pages 202 to 205, Exhibit E and statement by Neal (General Manager of the Newport News Plant), Pages 4 thru 9 in Exhibit F. The substance of these are as follows:

15. Quoting from Page 202, Exhibit E. Dugan: "The last matter I want to bring up is that you allegedly made a proposition to the Plant Committee to set up a secret organization in order to get business for the Newport News Plant." (This allegation was by Mr. Click.) "Then, Mr. Click goes on to say that 'the action was turned down, no action was taken, and this concerns again the honesty and dishonesty of the operation." Will you comment on that?"

16. Mr. Hooper,, A. "Yes, Sir, I sure will. First of all, the proposal to the Plant Committee was not turned down but was approved without action. We did not want it on the books. (Emphasis supplied.) Now, here is our situation, and incidentally, - - -."

17. Professor Dugan, Q. "Let's go off the record a minute."

(Discussion off the record.)

18. The witness, Hooper: "Present at that meeting was our Division Manager at Newport News, Mr. Neal. We are

operating in Tidewater, Virginia, under a milk commission, which theoretically sets the minimum producer price and the minimum and maximum resale price for milk. Theoretically, the prices that you charged customers for milk shall be within the minimum and maximum as set by the Milk Commission. Wholesalewise, the minimum automatically becomes the maximum through competition."

19. "Now, this is where we start from. We are in the market to compete with 44 distributors. The *general practice* in the Tidewater market, as well as all other markets under the Milk Commission in Virginia, *is to give rebates,* discounts, and other things to make your sale attractive to the buyer *at a better price than prices set by the Milk Commission*". (Emphasis supplied.)

20. "If you are going to do business, you are going to meet the competition in the market in which you are to do business - - -."

21. "At first, we asked Mr. Merrigan, as our General Counsel, to set us up a corporation in New Jersey whereby we could funnel funds to be used for the purpose of meeting our competition. Mr. Merrigan has drawn up such corporations, which have not been filled out and which I don't think we will use."

22. "Mr. Neal appeared before the Board at this other Committee at this time and went into considerable detail on this and pointed out just what we would have to do, just what we were facing. This was discussed in great length by the Plant Committee and unanimously, and Mr. Neal and I concurring, all stating that we didn't like to do business this way, but if we have to do it, we have to meet competition or we are out of business. - - -" *The Committee said, "What do you want us to do*? We don't like this type of thing." We said, "None of us like it."

23. They said, *"Go ahead and do what you want to, what you have to do, but don't give us any more detail."* (Emphasis supplied.)

24. "Now, this is the story, and I think your Plant Committee, individually, will tell you this is what happened."

Dugan, Q. "Off the record?"

(Discussion off the record.)

25. Beginning on Page 5, Exhibit F, quoting Mr. Neal: "- - - Under Milk Commission regulations, you are not allowed to make gifts, supply cabinets, cases, etc."

"But, unfortunately, the Milk Commission, so far, has not proven itself capable of regulating itself - - its own regulations, you may say. And there is in the market today, as it has been approximately ever since I have been there, which is close to 28 years, a situation where things are being done in the market *and innumerable accounts that are in violation of the Milk Commission regulations.*"

26. Dugan, Q. "Now, before we go into any more definite testimony, (Page 6) I just want the record to show that you were offered an opportunity to get a lawyer, and that this is true of everybody I am talking to. I am making that same offer. And if you want to have a lawyer, you can cease testifying and get yourself a lawyer."

27. Neal, A. "Oh, no."

28. Dugan, Q. "All right. Now, have you had any ideas in regards to meeting this discount competition in the Norfolk area?"

29. Neal, A. "Yes, Sir. - - - I went over the situation very thoroughly with Mr. Hooper. I strongly recommended to him

and urged that in order for us to survive in the market and be able to show any Class I sales, it was necessary for us to meet the competition. - - -"

30. Page 7. Dugan, Q. "And then this idea was taken up by Mr. Hooper with the Board of Directors?"

31. Neal, A. "With the Plant Committee."

32. Dugan, Q. "You were present at that time?"

33. Neal, A. "It was taken up with the Plant Committee against my approval."

34. Dugan, Q. "Would you explain that?"

35. Neal, A. "Yes, Sir, I explained it to the Plant Committee also. Mr. Hooper brought the idea up before the Plant Committee, at which time he stated I was opposed to bringing it to their attention. We went into detail with what we were faced with in the market, that he acquiesced in my feeling in checking out the matter, that in order for us to surfive we would have to meet competition. (Page 8) After he had gone into detailed explanation to the Board - - - ."

36. Dugan, Q. "The Plant Committee?"

37. Neal, A. "To the Plant Committee, yes. I had my opportunity to also discuss it. I told them at that time my reasons for not bringing it to them, that I felt it was a part of management to make these types of decisions, insofar as meeting competition was concerned. It wasn't my intention to hold anything from the Plant Committee or the Board of Directors. But, I felt working it out within our own operation, *it would put the Plant Committee and the Board of Directors in such a position that if something would come up or if something should come up in the future, they could take the position they neither knew about it nor could either*

acquiesce in it. I felt it was my duty, as management, to take that position." (Emphasis supplied.)

38. Dugan, Q. "You feel it is the responsibility of management to meet competition on such a basis as you deem necessary?"

39. Neal, A. "Yes, within the framework and policy of the Association itself. - - - "

40. Page 9. Dugan, Q. "Was Mr. Click there?"

41. Neal, A. "Yes, Sir. He was there."

42. Dugan, Q. "Are you aware he put in his resignation to the Association?"

43. Neal, A. "Yes, Sir. I was in the Board of Directors Meeting at the time he tendered his resignation."

44. Page 10. Dugan, Q. "*And one of the reasons for that resignation was the fact the Association was going contrary to the common conscious of honesty and decency?*" (Emphasis supplied.)

45. Neal, A. "I don't remember the exact words he read in his resignation but they were along that line; Yes, Sir."

46. Dugan, Q. "*You are aware that one of the things he specifically mentioned was it was contrary to honesty and decency, this discount proposition that you had?*" (Emphasis supplied.)

47. Neal, A. "Professor, after he read his resignation, the Board went into Executive session, at which time I left, along with Mr. Hooper and Mr. Click."

48. It must be remembered that Mr. Click was then Assistant Secretary, Treasurer, and General Manager.

Duties of Secretary:

1. To keep a complete record of the proceedings of all meetings of the Association and of the Board of Directors, its Executive Committee and Finance Committee. (Article IX)

Duties of Treasurer:

2. To receive and deposit in its name all the funds of the Association in bank and account for all receipts, disbursements and balance on hand.

MORE ON THE SUBJECT OF CONCEALMENT

49. Page 80, Exhibit G, Statement by Hooper.

Dugan, Q. "Will any of these discussions show up in the Minutes?"

Hooper, A. "No, Sir. The Plant Committee Minutes are probably – and there is a reason, because the Plant Committee didn't want it on the record. - - - "

Page 82. "The Board did discuss a lot of things, but there are few records of it. The Committee felt it was not wise to go into too much detail with the full Board. So it just did not do so. (All members of the Plant Committee are Directors.)

This, of course, caused some of the problems in the Board and the Board began to look into it and started questioning it - - - "

"The Plant Committee is picked by the President, it is not elective."

DIRECTORS SEEKING FACTS

50. Director Martin's statement, Exhibit H, shows that some of the producers and some of the Directors got wind of the Harrison situation while Directors on the Executive Committee, Finance Committee, and the Plant Committee, claim they didn't know anything about it.

51. Page 41 shows that one producer by the name of Joe Goode went to Florida to see for himself - - - that was the first that Director Martin (not on above committees) knew of this situation.

52. On Page 37 at the bottom of the page, of the Dugan Report, Exhibit A, it is stated by Director Norman that one of his producers told him about Harrison Dairy Products in August of 1961. Mr. Zorn (Association bookkeeper) said, "- - - Everyone knew - - - everyone in the office - - - we all knew he (Robinson) was building a plant in Oneida, New York." Exhibit J, Page 252. It is mighty strange that the producers learned about these goings on before the Directors *admit* that they did.

53. On Page 20, Exhibit H, Dr. Martin's statement. Martin thought the Harrison Plant was in operation (this is after it was purchased by the Association and the investigation by a committee.)

54. Page 21. Martin got so concerned, he discussed it with Director Miller and in the latter part of September, he spent two days in Jacksonville. In 1963, he met John Ceconi there. They went to the plant to see what was there and it was closed. With a very small inventory of supplies. This was September 27th, or 28th, in 1963. Ceconi was amazed that Martin, a Director, did not know that the plant had been

closed. He said "it never showed any semblance and had been discontinued two months before we acquired the plant." Martin was amazed, had no idea the place was not in operation and Ceconi thought he was kidding him.

55. The plant was overgrown by weeds and grass. This all on Page 24.

56. Page 31, discussion with Ceconi: A. "I can tell you this: Mr. Ceconi made a statement to me – and I think he will tell you the same thing – when I said I couldn't understand the decrease in sales, he said, "What decrease in sales?" And I said that the 7-month record showed over one million dollars, and he said, "The whole time that this plant down there was in operation, $100,000 worth of business was not done through that plant," and he could not understand it. "I can now because these sales were made in other areas, such as Laurel, and given credit down in Florida. That is the reason I do now see why we had one million dollars of sales and that it dropped off to one hundred thousand dollars."

57. Q. What you are getting at is that you have a suspicion that sales were being made through Harrison Dairy Products, and the Laurel Division of the Association was shipping direct? That is the point, is it not?

58. A. Yes, Sir.

59. Q. The audit will show it.

60. A. I am very familiar with that, and it will back that up, too.

61. Page 47, Exhibit H. Martin first found out about the Oneida Plant when it was being built the latter part of November in 1961.

61½. Page 53 and 54. More on the subject of "Conflict of Interest" – Mutual paying 12 cents and selling the powder at 15 cents, etc.

HARRISON BOUGHT TO SAVE FACE

62. Page 240, Exhibit J. Harrison Dairy Products Company was bought to save face for having the manager participating. Director Crossman did not know of sales to World Dairy Products Company, New York, and other sales through Harrison.

Page 243. Crossman first heard about New York when a producer asked him "How about that damn thing going on with Robbie in New York?" Producer was Claud Jenkins.

Page 244. Crossman talked to Remsberg about it.

Page 245. Not put in the Minutes.

Pages 29-36, Exhibit K, statement by Click. Director King asking him for information.

Page 36. "People in the industry getting to know 'This business going on in New York' ".

The above is submitted to show the results of the Minutes of Plant Committee Meeting being as Professor Dugan described "utterly worthless".

FAILURE TO INFORM THE MEMBERS OF THE FINDINGS BY THE MARYLAND COURT OF APPEALS

63. In the April, 1969 issue of the "MARYLAND AND VIRGINIA MILK PRODUCER'S NEWS", Exhibit L, on Page 14, appears an article entitled: "Court Case - Parish".

64. It is significant that in the Association's zeal to report on the Parish case at the annual meeting, no mention was made of the outcome of the case of Parish vs. Maryland and Virginia Milk Producers, et al., 250 Md. 24, 242 A.2d 512, and the Appeals Court's opinion regarding certain

activities of the Association. This follows, in part:

> At page 539, "The fraud and concealment, as well as the clear breach of fiduciary duty on the part of Hooper and Robinson are specifically and graphically alleged in Paragraphs 18, 19, and 20 of the complaint. Many of the specific acts of fraud, double-dealing and breach of fiduciary duty are described in detail in Exhibit G, which is a statement taken, in part, from the Dugan Report and which was circulated by the defendants that these allegations are not sufficient to charge Hooper and Robinson with fraud, concealment, doubledealing and breach of fiduciary duty. The defendants take the position that the general release given Hooper and Robinson is shown to be a complete bar on the face of the complaint. As we will point out later in this opinion, that position is not well founded.
>
> *It is clear that officers and directors of a corporation stand in a sufficiently confidential relation to the corporation's stockholders to impose a duty upon them to reveal all facts material to the corporate transactions.* A.B.C. Packard, Inc. vs. General Motors Corp., 275 F.2d 63 (9th Cir. 1960). See 37 C.J.S. Fraud 16, page 248. *The confidential relation is even more apparent in a member corporation such as the Association.* The allegations of the complaint indicate that the members have not been properly informed by the officers and directors of the Association in regard to the various transactions set forth in the complaint and, indeed, that the members have been deceived by the false Annual Reports. The members have been lulled into inaction and the Association has been damaged by failing to take action promptly to assert its rights so that possible defenses of limitations may have accrued and, in any event, it has been made more difficult to ascertain and have the facts necessary to establish the claims of the Association.

The complaint sufficiently alleges facts which in themselves indicate a fraudulent concealment by the defendant directors and the defendant auditor and active fraud by Hooper and Robinson as well as a fraudulent concealment by them and breach of fiduciary duty. The concealed facts were material, properly relied on by the Association and its members, and the Association's damage resulting therefrom has been alleged." (Emphasis supplied)

65. In light of the opinion of the Court of Appeals, above stated, and the facts herein revealed, attention is called to the Association's statement of January 30, 1965, Exhibit M, released to the press and sent to all members.

This states in part: "The Board of Directors of the Maryland and Virginia Milk Producers Association strenuously resents and denies all of the material allegations contained in a complaint filed against the Association and its Directors by Frank P. Parish – Groundless charges – The Board of Directors made detailed reports to the entire membership – After hearing these detailed reports, the entire membership, except the Parishes and a few others – rallied behind the Directors and congratulated them for the forthright manner they had steadfastly acted etc., etc.

NEED FOR FURTHER INVESTIGATION

66. Page 1, Exhibit A, refers to need for further investigation.

Get Financial Statements of both Berger and Metropolitan Food Corporation (to appraise the financial stability of the buyers of Embassy).

66½. There must be a complete audit of the Association's fixed asset account.

There must be an accounting for time Association employees at Laurel spent at Robinson's Plant in Oneida, New York, and a complete investigation of the books showing all sales to Mutual Milk Sales Packaging Division.

67. See Hooper, Page 19, Exhibit G. Full investigation is required of Richfield-Wakefield-Holbrook & Lee Dairies. Who owned them? These are all financially shaky to which credit has been extended.

68. Exhibit G. Must determine facts as to statement by Hooper, Page 23, "Spent $1,500,000 to modernize Embassy. If this were true, the loss on the sale of Embassy would be this much greater than was reported."

69. Page 49, Exhibit A. Dugan recommendation – "I would recommend that an audit be made of the present operation (Harrison Dairy Products)."

70. Page 64. Dugan did not have time to investigate the Marshall Properties, Inc., in which, apparently, Mr. Hooper has some interest.

71. Also on Page 64. He did not have an opportunity to investigate the connection between the Laurel Plant and Red 73 Operation of Mr. Stevens. He recommended a complete audit be made by the auditors of any relationship between these companies.

CONCEALMENT OF SHORTAGE IN REVOLVING FUND

72. Investigate Revolving Fund and accounting of same. See Minutes of Joint Meeting of Finance and Executive Committees of October 20, 1964. Mr. Click and Mr. Snyder reviewed with the Committees, the current status of the Association's Revolving Fund in relation to the outstanding capital Revolving Fund Certificates, pointing out that certificates outstanding are in excess of the Revolving Fund

and the primary reason for this difference is the effect of the $500,000 discount on the Embassy note. Members were not informed.

SALES TO GOVERNMENT

73. Quoting from Pages 57, 58, and 59, of the Dugan Report, Exhibit A: "It is undisputed that the commodity credit corporation of United States Government sets the price for all surplus milk. Between 50% and 60% of all surplus milk is sold to the Government. An examination of the price list shows that the Laurel Division made many sales below the Government support price. At testimony, Mr. Robinson shows that it cost 2.4 cents per pound to sell to the Government. It is not clear, precisely, on what basis he makes this statement, but it is quite clear that a study should be made by the Association as to whether this estimated cost figure is actually true. The Association has been informed, by Mr. Robinson and Mr. Hooper, that sales to the Government are a last resort. Mr. Merrigan and I have talked to the Deputy General Counsel of the Department of Agriculture, and more particularly to Mr. Hull and Emery, who is a Deputy Director of the Livestock & Dairy Policy Staff of the Agricultural Stabilization & Conservation Program. We learned from both of these gentlemen that total rejections by the Government of sales of surplus dairy products is a very small amount. While I have not had time to make a sufficient study of this matter, it appears to me that no one in the Association has done so, either. I believe from the material that has been furnished me by the Department of Agriculture, that any sale below the support price by the Association should be a matter of concern to the Plant Committee and to the Board of Directors and that the management of the Laurel Division make *a complete explanation of any instance when such a sale is made*."

74. It is certainly essential to have a thorough investigation of the pricing and sales to Embassy in light of Director Sollenberger's notation that Laurel sold Embassy its Class I milk at Class II price. See Exhibit N.

It is obvious that the sale of fluid milk back into the fluid milk market through dairies at Class II price and not Class I price, not only thwarts the Government's attempt at bolstering farm income but, also, deceives the members by showing a profit to the manufacturing plant at Laurel for the sale of this milk which was greater than the profit would have been had it been converted into by-products.

74½. It is essential to have an investigation of all sales below Government support price. We find there is virtually nothing said on the plant at Newport News. This certainly needs investigating like everything else.

75. Page 26, Exhibit O. Robinson "It is a wheeling dealing business - - - a wheeling dealing business - - - from beginning to end".

76. Page 265, Exhibit P. $3,500 per month for Robinson's airplanes.

REBATES AND KICKBACKS, COMMON PRACTICE

77. Quoting from Page 8, "Editorial Comment, HOARD'S DAIRYMEN, July 10, 1965, Exhibit Q: "According to the official U.S.D.A. notice, here is the picture in the order:

"Audits of the records of various cooperative associations and their proprietary handlors and other investigation have revealed widespread practices resulting in the undercutting of the established minimum order prices. Further, efforts appear to have been made to conceal the true nature of the transactions by: the maintenance of incomplete or dual records; the establishment of dummy corporations and the use of third party intermediary; the establishment of special accounts through which payments for alleged services are made; payments in the guise of brokerage fees, *all or part of which eventually accrue to the proprietary handler or persons intimately associated with such handlers,* and by other intricate and devious means. To the extent possible in the circumstances, all available legal procedures will be pursued in order to enforce the existing order as to any past or current violations." - - - (Emphasis supplied.)

U.S.D.A. said, "The present situation in the Delaware Valley order results in almost insurmountable administrative difficulties. This indicates one of two things: either U.S.D.A. cannot enforce the law - - - or the law is inadequate to proper enforcement. For the first, there is no valid excuse. For the latter, that *the U.S.D.A. asked for remedial legislation in the marketing agreement act which authorizes Federal milk orders.*" (Emphasis supplied.)

"We simply cannot see the logic of burning down the house to get to a few vermin who have happened to have infested it."

78. Quoting from THE EVENING NEWS, Harrisburg, Pennsylvania, Monday, February 8, 1965, Exhibit R: "SCRANTON ORDERS MILK KICKBACK INQUIRY" - - - "During the weekend, two State legislatures said a resolution would be introduced in the General Assembly today *in the wake of U. S. Internal Revenue Services' disclosure of a 'widespread system of kickbacks' in the milk industry. - - - "We feel the resolution is necessary because of the Commission's failure to follow up on the publicly announced disclosures by the Internal Revenue Service (I.R.S.) that some specified milk dealers were guilty of accepting kickbacks in excess of $500,000 and not reporting same as income."*

"John H. Eingler, Pittsburgh, *District Director of I.R.S., said his Department uncovered the system of kickbacks during a three-year investigation. The I.R.S. said the kickbacks and rebates were paid by cooperatives to milk dealers often without the knowledge of the individual farmers who belong to the cooperative.*" (Emphasis supplied:)

"Kickbacks and rebates are illegal under Pennsylvania law, but are not under Federal law. They must be reported as income for Federal tax purposes, the I.R.S. said."

"*Crosson O. Davis, who headed the I.R.S. investigations, said, "It was begun because 'there was a tremendous spread between what the farmers were being paid for their milk and what the customers were paying for it'*". (Emphasis supplied.)

CO-OP

79. Quoting from the FARM JOURNAL, June 1969, Page 33: "GIANT NEW CO-OP AIMS FOR MORE MARKET POWER". If approved, A.M.P.I. will rake 42,600 producers into the first of the super co-ops as five other big regionals take shape." (Exhibit S.)

"MERGER FEVER IS RUNNING HIGH among dairy co-ops everywhere. A dairy leader in the Southeast proposes that the powerful Great Lakes Federation links up through merger all the way to the Gulf. - - - Meanwhile co-ops serving the Philadelphia, Baltimore, and Washington markets have gone ahead and federated into the small regional, they call, Penn-Mar-Va. It looks too small to withstand the gravity of the big groups flanking it."

80. It took the Crash of 1929 *and public indignation to bring about the legislation creating the Securities & Exchange Commission.*

81. It is respectfully urged that no cloak of secrecy may be permitted to deter serious and immediate consideration for

legislation which will impose upon all such co-ops a requirement to comply with the legal obligation and duty of trustees, dealing with farmers' produce, to report to their members "all that it is essential for them to know for the protection of their interests" --- in keeping with the "punctilio of honor" required of trustees *and that such reporting be under the direction and control of a Government Agency established for the purpose.*

82. It is respectfully submitted that the simple requirement (with teeth in it) of such reporting *under the direction and control of a Government Agency would*:

1. Make effective the prices set for surplus milk by the Commodity Credit Corporation of the U. S. Government.
2. Make effective the laws governing TRUSTEES.
3. Make effective the protective measures set forth in Articles of Incorporation & By-Laws.
4. Make effective the efforts of our members of the House and Senate toward stabilizing the economy of Dairy Agriculture.

"Common consciousness of honesty and decency", without full disclosure, proves to be inadequate.

83. The right to privacy applies only to:

1. Personal interests and personal property, *not* to ones actions in dealing with the property of others. In the latter case, one may suffer serious damages, even criminal prosecution, as a consequence of public disclosure of their acts but such is only the consequence of justice.

2. The acts of those dealing with the property owned by others, such as the Maryland and Virginia Milk Producers

Association's dealings with the milk and the proceeds therefrom of its members illustrate the point. The Association is a non-stock, non-profit corporation. It owns absolutely nothing. All of its net assets belong to those members who are now producing milk and former producers, the withholdings from whom created these net assets. This includes all potential assets or conditional assets such as the potential recovery from this litigation.

84. The Petitioner alleges that in view of the Association's vast sums of money to pursue their course of concealment, their attempt to brainwash the members of the Association and impose invalid By-Laws upon them, (see Item 7, Article XVIII and Article XIX, Pages 17, 18 and 19, Exhibit T), it is necessary for the Petitioner to be in a position to make the contents of the Dugan Report and related findings public.

85. There is no secret process, or development that needs the cloak of protection of this Court or any other order that justice requires to protect the party from hardships and financial loss, such is not the factual situation in the case before the Court.

The members and/or the general public must have full disclosure before they can act;

Before we can expect law enforcement to be effective, – State or Federal;

Before effective Legislation can be passed, – State or Federal;

Or the Commodity Credit Corporation of the U.S. Government can be expected to function effectively.

86. In such major matters, the news media represents the Nations very lifeline.

87. If the Dugan Report and other basic information is denied the members, the members of the Association will suffer irrecoverable loss by not being in a position to take and/or support appropriate action to remedy and rectify such irresponsible conduct. The Directors thereby remain unaccountable.

Frank P. Parish
In Proper Person

Theodore F. Parish
In Proper Person

ORDER

Ordered by the Court that the restraining and injunctive provisions of the Order of the Court dated December 4, 1968 be rescinded.

Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Statement was mailed, postage prepaid, this 17th day of July, 1969, to the following attorneys herein:

William J. Rowan, III, Esq., 260 E. Jefferson Street, Rockville, Maryland;

M. Peter Moser, Esq., 22 Light Street, Baltimore, Maryland 21202;

William B. Somerville, Esq., One Charles Center, Baltimore, Maryland;

Thomas J. Michie, Jr., Esq., 601 East Market Street, Charlottesville, Virginia;

Alger Y. Barbee, Esq.,, 22 S. Perry St., Rockville, Maryland;

James R. Miller, Jr., Esq., 200 Monroe St., Rockville, Md.;

Francis D. Murnaghan, Esq., 1400 Mercantile Trust Building, Baltimore, Maryland 21202;

Edward L. Merrigan, Esq., 1700 Pennsylvania, N. W., Washington, D. C. 20006;

Sachs, Greenbaum & Frolich, Esqs., 600 Hill Building, Washington, D. C. 20006;

Albert E. Brault, Esq., 101 South Washington Street, Rockville, Maryland 20850;

Herbert M. Brune, Esq., 1445 Maryland National Bank Building, Baltimore, Maryland;

Hogan & Hartson, Esquires, 815 Connecticut Ave., Washington, D. C. 20006;

Charles N. Shaffer, Esq., 342 Hungerford Drive, Rockville, Maryland.

/s/ Frank P. Parish
In proper person

/s/ Theodore F. Parish
In proper person

L

SUPPLEMENT TO MOTION TO MODIFY OR TO DISSOLVE INJUNCTION
(Filed July 24, 1969 (page 20))

Frank P. Parish and Theodore F. Parish, Complainants, in proper person, move pursuant to Maryland Rule BB 79 for dissolution of the restraining and injunctive provisions of the Order of this Honorable Court, dated December 4, 1968. Your Complainants respectfully represents to your Honorable Court:

1. Your Complainants on July 17, 1969 filed a Motion to Modify the said Injunction referred to in the Court Order dated December 4, 1968.

2. That subsequent to the filing of the Motion to Modify the Injunction, dated July 17, 1969, your Complainants have been advised and reliably informed that a hearing will be held at Baltimore City, State of Maryland, at 10:30 o'clock a.m., on August 4, 1969, on the proposed merger of the Washington, D.C. milk marketing order with two other eastern orders; said hearing will be conducted by the Consumer and Marketing Service of the United States Department of Agriculture.

3. That the Complainants feel that the information of wrongful acts by the Defendants as set forth in the Dugan Report and supporting testimony, is so important that it would be an injustice to preclude any member from revealing such information to the attention of the officials conducting the hearing, especially in light of the failure to regulate past marketing orders and support prices.

4. That the Complainants seek to dissolve the injunction to the end that secrecy and concealment existing among the Directors to the detriment of the Complainants, and others in such a similar position, but by the terms of the Injunction Order, dated December 4, 1968, Complainants are not at

liberty to discuss the Dugan Report and supporting testimony, and the wrongdoings of the Defendant Association as set forth therein at the hearing to be held on August 4, 1969.

5. That on page 5, Exhibit F, of testimony refferred to in Complainants' Motion to Modify Injunction of the testimony taken by Professor Dugan, quoting directly from the testimony of Thomas E. Neal, Jr., who at the time of the Dugan Report was the Division-Manager of Marva Maid Dairy, 5500 Chestnut Avenue, Norfolk, Virginia, a division of the Defendant Association, Mr. Neal gives the following testimony relating to the ineffectiveness of the Milk Commission Order:

> "But, unfortunately, the Milk Commission so far has not proven itself capable of regulating itself – its own regulations you may say. And there is in the market today, as it has been approximately ever since I have been there, which is close to 28 years, a situation where things are being done in the market and innumerable accounts that are in violation of the Milk Commission regulations."

It is imperative to Complainants cause of action that they be in a position to divulge the contents of the Dugan Report, and of the testimony taken by Professor Dugan to enable them to properly prepare their case for trial as they need to discuss the contents with auditors and certified public accountants, and also to make the contents known to the officials conducting the marketing hearing.

6. That to keep the Dugan Report and the testimony relating thereto, under the cloak of protection of the Equity Court, is only compounding further concealment of the devious scheme of the Defendants.

7. There are no secret processes involved on the part of the Defendant in this litigation, and we respectfully state that nowhere in the Maryland Rules is there a sufficient reason to

warrant that the contents of the Dugan Report and testimony relating thereto to place the Complainants under an order not to divulge the contents thereof.

WHEREFORE, Your Complainants pray that the Order of Restraining and Injunctive provisions of this Honorable Court, dated December 4, 1968 be herewith dissolved.

AND AS IN DUTY BOUND, etc.

/s/ Frank P. Parish
In Proper Person

/s/ Theodore F. Parish
In Proper Person

ORDER

IT IS HEREBY ORDERED by the Circuit Court for Montgomery County, this day of July, 1969 that the restraining and injunctive provisions of the Order of this Honorable Court, dated December 4, 1968 are hereby dissolved.

Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Statement was mailed, postage prepaid, this 24th day of July, 1969, to the following attorneys herein:

William J. Rowan, III, Esq., 260 E. Jefferson Street, Rockville, Maryland;

M. Peter Moser, Esq., 22 Light Street, Baltimore, Maryland 21202;

William B. Somerville, Esq., One Charles Center, Baltimore, Maryland;

Thomas J. Michie, Jr., Esq., 601 East Market Street, Charlottesville, Virginia;

Alger Y. Barbee, Esq., 22 S. Perry St., Rockville, Maryland;

James R. Miller, Jr., Esq., 200 Monroe St., Rockville, Maryland;

Francis D. Murnaghan, Esq., 1400 Mercantile Trust Building, Baltimore, Maryland 21202;

Edward L. Merrigan, Esq., 1700 Pennsylvania, N.W., Washington, D. C. 20006;

Sachs, Greenbaum & Frolich, Esqs., 600 Hill Building, Washington, D. C. 20006;

Albert E. Brault, Esq., 101 S. Washington Street, Rockville, Maryland, 20850;

Herbert M. Brune, Esq., 1445 Maryland National Bank Building, Baltimore, Maryland;

Hogan & Hartson, Esqs., 815 Connecticut Ave., Washington, D. C. 20006;

Charles N. Shaffer, Esq., 342 Hungerford Drive, Rockville, Maryland.

/s/ Frank P. Parish
In Proper Person

/s/ Theodore F. Parish
In Proper Person

MOTION OF WHARFF ET AL FOR SEPARATE TRIAL OF TRUST ISSUE

(Filed September 10, based on the trust theory denied (October 17, 1969) (Page 6-14))

Come now the Complainants Edward M. Wharff, Jr., and B.G. Wenger, Jr., Intervening Plaintiffs, by their solicitors, Shaffer, McKeever & Fitzpatrick, and pursuant to the provisions of Rule 501, Annotated Code of Maryland (1957) moves this Honorable Court for an order granting a separate trial of an issue of law for the determination of the question whether, under the expressed intent as found in the Defendant Association's Charter, By-Laws and the Complainants' contracts for membership, the Complainants, on the one hand, and the Defendant Association and the individually named Defendants, constituting the Association's Board of Directors, on the other, occupy the status and relationship, respectively, of cestuis que trust and trustee.

In support of the affirmative of the legal issue framed above the Complainants respectfully represent unto this Honorable Court as follows that:

1. There is the question of law regarding the trust relationship "which it would be convenient to have decided before going further" particularly with respect to: (a) the duty of the Defendant Association and its Defendant Directors to fully and voluntarily disclose all evidence material to any and all of the matters alleged in the Bill of Complaint upon a finding that a trust relationship does in fact exist; and (b) the right of Complainants, upon such a finding, to have a special receiver appointed for the purpose of investigating, asserting, liquidating, compromising and, subject to the Court's approval, disposing of all the claims asserted in the instant litigation together with such other related claims as may be disclosed to the receiver during the course of his investigation.

2. On or about the 18th day of November, 1942, Complainant Theodore F. Parish, on or about the 9th day of November, 1961, the Complainants Frank P. and Theodore F. Parish, on or about the 18th day of August, 1959, the

Complainant Edward M. Wharff, Jr., and in and about the year 1950, the Complainant B.G. Wenger, Jr., respectively entered into agreements with the Defendant Association, in all respects similar to one another and to the agreements executed between the Defendant Association and its other members, a representative copy of which is attached hereto marked Exhibit A and prayed to be taken as a part hereof.

3. The agreements above referred to in Paragraph Two, of which Exhibit A is representative, in its pre-amble and in Paragraphs numbered One, Two, Three, Eight, Eleven and Fourteen provides in relevant part:

> ". . . . this agreement . . . . between . . . . a cooperative membership corporation incorporated under the laws of the State of Maryland . . . . and . . . [the Petitioner(s)] who is a member of hereby applies for membership in said association . . . and . . . hereinafter called the Producer.
>
> "WITNESSETH, That, in consideration of the covenants and agreements herein contained, the said parties have agreed, and do hereby agree as follows:
>
> "1. The PRODUCER *agrees to consign or to have consigned* to the ASSOCIATION or in accordance with its instructions all milk and/or cream produced on all farms owned or operated by the PRODUCER during the continuance of his contract . . . for and during the term . . . . unless and until notice is given in writing by either party to the other . . . that this contract will be terminated . . . .
>
> "2. The ASSOCIATION agrees to sell or dispose of all of the said milk . . . consigned to it or its order under and complying with the conditions hereof *to the best advantage in its power . . . and remit the proceeds thereof to . . . producer* less the deductions hereinafter mentioned . . . or at its option may authorize the purchaser of such milk to pay direct to the PRODUCER on or about the 15th day of each

month all of the purchase money therefor except the said deductions.

"3. The ASSOCIATION . . . [shall deduct on a proportionate basis] from the proceeds . . . operating expenses . . . [etc.].

* * * * * * *

"8. *The Association agrees to exercise its best efforts to sell at fair prices* all the milk . . . produced by its members . . . and dispose of same and collect the proceeds and distribute the net proceeds between the Producer and the other producer members of the Association in same Market Area in the manner herein contemplated and provided for by the . . . [charter], by-laws, rules and regulations which are hereby . . . . made a part of this contract and . . . [the Association shall] faithfully and impartially perform and administer this agreement, its . . . [charter], by-laws and rules and regulations, and its Board of Directors is constituted the sole arbiter of all questions essential to or arising in connection with such distribution or involving the proper construction of the . . . [charter], by-laws, rules and regulations of the Association in force from time to time, or of this contract, as between members of the same or different Market Areas and all such questions are hereby referred to the said Board of Directors and its decision after hearing shall be final, provided that the Producer desiring so to do and making application therefore in writing shall be entitled to appear before said Board in person or by counsel and present his claim and evidence in support thereof at a time and place to be designated by the Board.

* * * * * * *

"11. The Producer agrees not to sell, transfer or assign by lease, sale or otherwise, either the title or possession of . . . [any farm or herd thereon owned or operated by him for] the purpose or effect of releasing the Producer . . . . [or the milk

> produced] . . . from the obligations in respect thereto arising out of this contract . . .
>
> * * * * * * *
>
> "14. It is hereby further stipulated that this Contract . . . [the Charter], and . . . By-Laws of the Association, its rules and regulations . . . comprise the entire contract between the parties."
>
> (Emphasis added).

4. The Certificate of Incorporation of the Defendant Association, as amended to March 22, 1955, in relevant parts reads:

> "Certificate of Incorporation
> of
> Maryland and Virginia Milk Producers
> Association, Incorporated
> As Amended to March 22, 1955
> Operating Under the Cooperative Association
> Law of Maryland
>
> * * * * * * *
>
> ARTICLE II
>
> "The objects of his corporation shall be to encourage better and more economical methods in producing dairy products; to secure better results in marketing and advertising our products; to develop our markets and find new ones for our products; to buy supplies in a cooperative way; to rent, buy, build, own, sell and control, such buildings and other real and personal property as may be needed in the businesss; to own, lease and operate storage warehouses and packing houses; to arrange for the transportation and handling of our products in the best possible manner; to cultivate the cooperative spirit among dairymen and to perform any other work which may tend to the betterment of the members and the promotion of our industry.

ARTICLE IV

"This corporation shall not have any capital stock. Each member shall be required to pay a fee of $1.00 payable in advance. Each member shall be entitled to only one vote,

* * * * * * *

ARTICLE VII

"Among the purposes of the said Maryland and Virginia Milk Producers Association, Incorporated, shall be to handle as agent . . . milk produced by its members and products and by products derived therefrom . . . *The Association shall operate on a nonprofit basis for the mutual benefit of its members as producers and it is obliged to distribute any surplus or excess remaining at the end of any year, over and above the cost of doing business, on a patronage basis to its patrons for that year in cash, in certificates or otherwise.*

* * * * * * *

ARTICLE VIII

"The voting rights of members shall be equal but the property rights of members shall be unequal and shall be determined at any time that occasion therefor arises by the proportion that the value in dollars of the patronage of each member shall bear to the total patronage of all the members with the Association, but in determining property rights all amounts allocated to each patron or evidenced by certificates of any kind shall be excluded . . . " (Emphasis added).

5. The By-Laws, as amended to February 25, 1963, in pertinent part provide:

"ARTICLE XIV
General Provisions Concerning Members

"(a) *Not a Profit Corporation*: This Association is organized *for the purpose of mutual help*, without capital stock, and *for the purpose of serving its members only and providing all of its facilities to them upon uniform rules and regulations* to be prescribed by the Board of Directors of the Association.

* * * * * * *

"(f) *Financing and Operating Association*: For the purpose of providing and maintaining funds for all operating and maintenance costs and expenses of every character and adequate capital for operating purposes . . . the Directors are authorized to withhold from member . . . patrons from the proceeds from milk and cream, produced by and sold for them in some form by the Association such uniform sums as the Directors may deem adequate. From the funds so withheld during each fiscal year all current operating costs and expenses for the fiscal year shall be paid as soon as they can be ascertained. Any excess remaining . . . the Association is hereby obligated to allocate among the patrons of the Association on the basis of quantity or value of business done with or for each patron determined by reference to the net earnings of the Association from business done with or for such patrons *for whom it sold milk* and/or cream during that fiscal year; and it shall pay the amount allocated to each patron after the close of the fiscal year by means of any . . . revolving fund certificate . . . which discloses to the recipient the stated dollar amount allocated to him, and the portion thereof, if any, which constitutes a patronage dividend, provided that at least 20% of the amount of all such allocations be paid in money or by qualified check. *All such amounts so allocated* other than the amounts paid in money or by qualified check, *are* *received and furnished as capital; and they shall have exactly the same status as though the amounts involved had been paid in cash to each patron and he had then invested a like amount in the Association.*

"All such excess amounts for any fiscal year, together with excess amounts from fiscal years prior to the adoption of this By-Law by whatever name called and of fiscal years subsequent thereto shall constitute a capital revolving fund and shall be a part of the capital of the Association . . .

"Whenever in the discretion of the Directors they are of the opinion that . . . would justify doing so, they may refund to those member . . . patrons who furnished such capital, amounts so furnished by them regardless whether they are patrons of the Association. Capital so refunded shall be refunded by years in sequence . . . . " (Emphasis added).

6. Pursuant to the provisions of Article XIV(f) of the Association's By-Laws quoted in Paragraph Five above, the Association has issued to the Complainants Wharff and Wenger and they now hold Capital Revolving Fund Certificates representing Complainants' account of capital furnished to the Association by authorized deductions or retentions from the sale of milk and milk products consigned to the Association prior to the cessation of production of milk and milk products on farms owned or leased by them, their certificates not yet having been retired.

7. Upon Complainants' establishing to the Court's satisfaction any and all of the matters alleged in the Third Amended Bill of Complaint filed herein and obtaining a recovery in the Third Amended Bill of Complaint filed herein and obtaining a recovery in behalf of the Association against any of the individual Defendant, such recovery would increase on a patronage basis the capital account of the Complainants for the years to which the recovery is applicable.

Complainants request a hearing in open Court upon the foregoing Motion.

OPINION OF COURT DENYING MOTION FOR APPOINTMENT OF RECEIVER
(October 17, 1969 (Page 14))

(T. 19) Before doing so, the Court is reminded that we have not disposed of two other motions inadvertently, and we think that we should dispose of the Complainants' motion for separate trial and for the appointment of receiver. Both of these motions are denied.

We feel it unnecessary that there be a separate trial on the issued that have been presented so far as the trust aspects are concerned. With respect to the appointment of a receiver, this is of course a very drastic, harsh remedy which the Courts are very reluctant to provide, and we feel that this case is unsuitable for any such remedy that would result only in the delay of the determination of the issues involved in this case even if it were granted; but we find basically that there are no grounds as asserted by the Complainants for the appointment of a receiver.

Accordingly, both motions are denied.

AMENDMENTS TO THIRD AMENDED BILL OF COMPLAINT
(Behalf of Petitioners Wharff and Wenger
(October 20, 1969) (Page 6))

The Complainants, Wharff and Wenger, by their Solicitors, Herbert M. Brune and Charles Norman Shaffer, pursuant to leave granted them in open Court on Friday, October 17, 1969, amend the Third Amended Bill of Complaint by:

(1) Adding a new paragraph thereto numbered 28, and reading as follows:

"28. That the Complainants, and each of them, are members and representatives of the entire class of milk producers shipping milk to the Association, comprised of both present and past shippers who shipped milk to the Association during some or all of the period beginning from on or about January 1, 1954 up to and including on or about December 31, 1964, and as such are entitled to maintain this class action as beneficiaries of a trust, namely, the Maryland and Virginia Milk Producers Association, Inc., incorporated and operated exclusively for the benefit of its members, including said class, to recover on behalf of the said trustee and the members of the said class any and all money and property arising out of the matters hereinbefore alleged in this Complaint."

(2) Adding new prayers for relief numbered 4A. and 4B. to be inserted between Paragraphs 4 and 5 of the prayers, reading as follows:

"4A. That this Honorable Court enter a Decree declaring that the legal relationship of the Defendant Association and its members who shipped milk to it during some or all of the period beginning on or about January 1, 1954 up to and including on or about December 31, 1964 was, respectively, that of trustee and beneficiary."

"4B. That this Honorable Court enter a Decree that any and all funds or property recovered in this suit shall be accounted for by the Defendant Association to that class of its membership represented by the Complainants in such amounts and proportions as this Honorable Court might determine, in accordance with the respective rights of the members of said class as beneficiaries of the trust described in Paragraph 28 of this Amended Third Amended Bill of Complaint."

Respectfully submitted,

SHAFFER, McKEEVER &
FITZPATRICK

By: /s/ CHARLES NORMAN SHAFFER
342 Hungerford Court
Rockville, Maryland 20850
762-1600

BRUNE, ROBERTSON & IGLEHART
1445 Maryland National Bank Bldg.
10 Light Street
Baltimore, Maryland 21202
301-752-3470

Solicitors for Complainants
Wharff and Wenger

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Amendments to Third Amended Bill of Complaint were mailed, postage prepaid, this 20th day of October, 1969, to the following attorneys of record:

M. Peter Moser, Esquire, 1508 First National Bank Building, Baltimore, Maryland

William B. Somerville, Esquire, One Charles Center, Baltimore, Maryland

Alger Y. Barbee, Esquire, 22 South Perry Street, Rockville, Maryland

James R. Miller, Jr., Esquire, 200 Monroe Street, Rockville, Maryland

Francis D. Murnaghan, Esquire, 1400 Mercantile Trust Building, Baltimore, Maryland

Edward L. Merrigan, Esquire, 1700 Pennsylvania Avenue, N. W., Washington, D. C.

Sachs, Greenebaum & Frohlich, 600 Hill Building, Washington, D. C.

Albert E. Brault, Esquire, 101 South Washington Street, Rockville, Maryland

Mrs. Theodore F. Parish, Thorndale Farm, Taneytown, Maryland

/s/ CHARLES NORMAN
SHAFFER

State of Maryland, Montgomery County, to wit:—

I Hereby Certify that the foregoing is a full, true and correct copy of Wharff and Wenger's Amendments to Third Amended Bill of Complaint filed in No. 29524 Equity, truly taken and copied from the record of proceedings in the Circuit Court for Montgomery County, Maryland, sitting as a Court of Equity, in the foregoing cause.

In Testimony Whereof, I hereunto subscribe my name and affix the Seal of the Circuit Court for Montgomery County, Maryland, this 6th day of January A.D., 1970.

/s/ Howard M. Smith
Clerk of the Circuit Court
for Montgomery County,
Maryland

SEAL

AMENDMENT TO THE THIRD AMENDED BILL OF COMPLAINT TO DECLARE A TRUST RELATIONSHIP OF DEFENDANT ASSOCIATION

Amendment to the Bill of Complaint by Parish (October 20, 1969) (Page 6)

Theodore F. Parish, Complainant, in proper person, pursuant to the Court's directive, submits the following as an Amendment to the Third Amended Bill of Complaint in the following respects:

1. Insert the following at the end of the twenty-seventh count of the Third Amended Bill of Complaint:

28. Complainant, Theodore F. Parish, pro se, respectfully states as follows:

1. That an actual and a justiciable controversy exists between Complainant, Parish, and Defendant Association on a number of issues, one of which is the legal relationship between the parties and the duties that flow therefrom.

2. (a) The Defendant Association is a non-profit, non-stock corporation which has, pursuant to its Articles of Incorporation, By-Laws (Exhibit C) and Contract (Exhibits A and B) taken possession and control of milk produced by its members, handled, processed, and marketed, etc. for the benefit of its members, and is still doing so. The Defendant Association has possession, control and legal title to money, personal and real property acquired by withholding and investing net proceeds from the sale of members' milk, which property is held for the benefit of its members including Complainant, Parish, in a share unknown to them.

(b) That the relationship between the Complainant, Parish, and said other members, and Defendant Association, is one of Trustee and Beneficiary, involving a fiduciary duty by the Trustee and Co-Trustees to account and disclose voluntarily to the Beneficiaries all they know or that has come to their attention which may be material to the Beneficiaries for the protection of their interests.

3. That Defendant Association in its Answer to the Third Amended Bill of Complaint denies the existence of a trust relationship.

4. The request for a declaratory judgment is necessary in that the determination of a trust relationship is basic and fundamental to the determination of the many questions raised in this case, and to assure that major wrongs still concealed will not become res ajudicata.

5. Complainant, Parish, prays to insert the following prayer to be known as Prayer No. 5, at the end of the fourth prayer for relief of the Third Amended Bill of Complaint:

> 5. Complainant, Parish, respectfully prays for declaratory judgment that, under the conditions recited in the Twenty-Eightth Count above, the legal relationship of the Defendant Association to its members is that of Trustee and Beneficiary and accordingly the Defendant Association is under such fiduciary duty of a Trustee to voluntarily account to and disclose to its member Beneficiaries all pertinent matters pertaining to all transactions by the Defendant Association in connection with its handling, processing, and marketing, etc. of the milk produced by its member beneficiaries and to render a financial accounting to its Beneficiaries for the proceeds and considerations received by it in the marketing of said milk and all by-products thereof.

6. That Prayer No. 5 now read Prayer No. 6 AND as in duty bound, etc.

/s/Theodore F. Parish
In Proper Person

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Statement was mailed, postage prepaid, this 20th day of October, 1969, to the following attorneys herein:

Herbert M. Brune, Esq., 1445 Maryland National Bank Building, Baltimore, Maryland 21202

Charles N. Shaffer, Jr., Esq., 342 Hungerford Court, Rockville, Maryland 20850

William J. Rowan, III, Esq., 260 East Jefferson Street, Rockville, Maryland 20850

James R. Miller, Jr., Esq., 200 Monroe Street, Rockville, Maryland 20850

Edward L. Merrigan, Esq. & Smathers, Merrigan & O'Keefe, 1700 Pennsylvania Avenue, N.W., Washington, D.C.

Alger Y. Barbee, Esq., 22 South Perry Street, Rockville, Maryland 20850

Francis D. Murnaghan, Jr., Esq., 1400 Mercantile Trust Building, Baltimore, Maryland 21202

William O. Bittman, Esq., 815 Connecticut Avenue, N.W., Washington, D.C.

Albert E. Brault, Esq., 101 South Washington Street, Rockville, Maryland 20850

M. Peter Moser, Esq., 1508 First National Bank Building, Baltimore, Maryland 21202

William B. Somerville, Esq., 1700 One Charles Center, Baltimore, Maryland 21201

Ivan J. Shefferman, Esq., 600 Hill Building, Washington, D.C. 20006

/s/Theodore F. Parish
In Proper Person

State of Maryland, Montgomery County, to wit:–

I Hereby Certify that the foregoing is a full, true and correct copy of Theodore F. Parish's Amendment to Third Amended Bill of Complaint filed in No. 29524 Equity, truly taken and copied from the record of proceedings in the Circuit Court for Montgomery County, Maryland, sitting as a Court of Equity, in the foregoing cause.

In Testimony Whereof, I hereunto subscribe my name and affix the Seal of the Circuit Court for Montgomery County, Maryland, this 6th day of January A.D., 1970.

/s/Howard M. Smith
Clerk of the Circuit Court
for Montgomery County,
Maryland

JOINT AMENDMENT BY COMPLAINANTS TO THE THIRD AMENDED BILL OF COMPLAINT

Joint Amendment to the Bill of Complaint and Declaratory Judgment filed November 18, 1969 (p. 301) (Page 6-14)

Theodore F. Parish, Complainant, in proper person, and Complainants Wharff and Wenger, by their Solicitors, pursuant to leave granted by the Court, hereby amend the Third Amended Bill of Complaint in the following respects:

1. By adding a new paragraph numbered 28, to be inserted at the end of the twenty-seventh paragraph of the Third Amended Bill of Complaint, reading as follows:

> "28*. (A). That an actual and a justiciable controversy exists between the Complainants and the Defendants, and particularly the Defendant Association, on a number of issues, one of which is the legal relationship between the parties and the duties that flow therefrom.
>
> "(B). That the Defendant Association is a non-profit, non-stock corporation which has, pursuant to its Articles of Incorporation and By-Laws (Exhibit C) and Complainants' Contracts (in form of Exhibits A and B) taken possession and control of milk produced by its members, handled, processed, and marketed the same, etc. for the benefit of its members, and is still doing so. The Defendant Association has possession, control and legal title to money, personal and real property acquired by withholding and investing net proceeds from the sale of members' milk, which property is held for the benefit of its members including Complainants in shares unknown to them.

---

*Paragraph 28 was added by Joint Amendment by Complainants, November 5, 1969.

"(C). That the relationship between the Complainants and said other members, and Defendant Association, is one of Trustee and Beneficiary, involving a fiduciary duty by the Trustee and Beneficiary, involving a fiduciary duty by the Trustee and Co-Trustees to account and disclose voluntarily to the Beneficiaries all they know or that has come to their attention which may be material to the Beneficiaries for the protection of their interests.

"(D). That Defendant Association in its Answer to the Third Amended Bill of Complaint denies the existence of a trust relationship.

"(E). That the request for a declaratory judgment is necessary in that the determination of the many questions raised in this case, and to assure that major wrongs still concealed will not become res adjudicata.

"(F). That the Complainants, and each of them, are members and representatives of the entire class of milk producers of the Association, and as such are entitled to maintain this class action as beneficiaries of a trust, namely, the Maryland and Virginia Milk Producers Association, Inc., incorporated and operated exclusively for the benefit of its members constituting said class, to recover on behalf of the said trustee and the members of the said class any and all money and property arising out of the matters hereinbefore alleged in this Complaint."

* * * * * * *

"4A. Complainants respectfully pray for declaratory judgment that under the conditions recited hereinbefore in the Twenty-Eighth paragraph, the legal relationship of the Defendant Association to its members is that of Trustee and Beneficiary and, accordingly, the Defendant Association is under such fiduciary duty of a Trustee to voluntarily account to and disclose to its member Beneficiaries all pertinent matters pertaining to all transactions by the Defendant Association in connection with its handling, processing, and marketing, etc., of the milk produced by its member beneficiaries and to render a financial accounting to its Beneficiaries for the proceeds and considerations received by it in the marketing of said milk and all by-products thereof.

"4B. That this Honorable Court enter a Decree declaring that the legal relationship of the Defendant Association and its members and producers who have shipped milk to it was and is, respectively, that of trustee and beneficiary.

"4C. That this Honorable Court enter a Decree that any and all funds or property recovered by the Defendant Association in this suit shall be accounted for by the Defendant Association to that class of its membership represented by the Complainants in such amounts and proportions as this Honorable Court might determine, in accordance with the respective rights of the members of said class as beneficiaries of the trust described in Paragraph 28 of this Amended Third Amended Bill of Complaint."

RULING (OPINION) OF COURT DELIVERED ORALLY DECEMBER 16 DISMISSING COMPLAINT

Ruling from the Bench December 16, 1969.
(See P.367). (P. 7) Trial Court Opinion,
January 5, 1970.

(Judge Moore's Decision.)

(The Court) The Court has had occasion heretofore to remark about how ably this case has been tried, and we think it appropriate at this time, before announcing our findings, to repeat this with respect to all counsel, not only in the presentation of evidence in the case itself, but also with respect to the great assistance which has been rendered to the Court by counsel – all counsel – in the very timely filing of well-prepared proposed findings of fact and proposed conclusions of law.

We would like, if the situation were such that the Court could take additional time, to write at length an analysis of the entire record as we see it, utilizing the proposed findings, but the time posture is such that we do not have that, shall we say, luxury.

The Court, however, has examined very carefully both during the time of trial and since then, all of the exhibits in this case as they came in and during recesses of the Court and, as of the last few days, we have read and examined each and every one of the some 400 exhibits, which have been presented in this case.

We have read very carefully and re-read and reviewed the excellent memoranda which have been submitted to the Court.

And so, on the basis of that, we will at this time announce our findings and conclusions and will state for the record that should there be any proceedings by way of an appeal we will request the reporter to transcribe the Court's statements now, and later we would use the (T. 4) transcript as the basis for more detailed findings of fact and conclusions of law, if necessary.

The Court is in the position now, having heard all of the testimony and examined the exhibits, to take something of a panoramic view of a much litigated controversy that has its origins back in 1965 when this litigation began; that was the time that the original bill of complaint was filed by Frank Parish and Theodore Parish, his wife, who at that time together owned a single membership in the Maryland and Virginia Milk Producers Association.

Following a series of demurrers and other proceedings that are described in the Court of Appeal's opinion, reported at 250 Maryland 24,the Third Amended Bill of Complaint was filed on February 28, 1967.

The Circuit Court for Montgomery County sustained a demurrer to the complaint on March 29, 1967, and the Court of Appeals in the decision to which we have referred, reversed this finding on May 10, 1968,and remanded the case to this Court for further proceedings.

Since that time, a counsel are aware, the zeal and industry and resourcefulness of counsel resulted in numerous motions and preliminary matters in this case, most of which are not now material to the disposition on the merits but which have occasioned eight separate hearings prior to the actual four week trial on the merits.

Of the preliminary developments that deserve mention at this time perhaps none has been more productive of discord than the intervention, withdrawal and dismissal of various parties. Mr. Dahlgren, (T. 5) one of the six complainants took an appeal from the Circuit Court Order of March 29, 1967, sustaining demurrers to the Bill of Complaint, withdrew on December 17, 1968, and his withdrawal was offset by the intervention thereafter of four other members of the association, Clifford R. Eader, Albert W. Lowman, Austin W. Main and Charles L. Main, whose motion for leave to intervene as party plaintiffs was granted on December 30, 1968, just about a year ago.

Shortly thereafter the four intervenors, having a change of heart, moved to withdraw. Following a hearing and upon consideration of the numerous papers filed on both sides, the Court ordered on October 3, 1969 that the intervenors be allowed to withdraw.

The ranks of the complainants were further depleted when the Court also ordered the dismissal of Mr. Parish, perhaps the chief protagonist in this litigation, for his refusal to conform to the Court's discovery Orders.

Mrs. Parish, Edward M. Wharff and Bernard G. Wenger are therefore the only complainants now remaining in the case.

On the other hand, the number of defendants in the case has been expanded by the Court's exercise of long-arm or extraterritorial jurisdiction over 12 additional directors of the Association, as well as over William B. Hooper, former general manager and secretary-treasurer of the Association, and Wayne Kendrick, previously retained by the Association as its auditor. Motions by these parties to quash service of process made pursuant to the long-arm statute were denied on September 11, 1969.

(T. 6) After this denial, the Court designated September 30, 1969 as the final date for filing motions, and on October 3, 1969 a final hearing on all outstanding motions was held in open court. Mr. Parish was dismissed at that time under Rules 414 and 422 and the four intervenors were permitted to withdraw.

Defendants' motions for summary judgment and the complainants' motion for appointment of a receiver were then argued and taken under advisement.

On October 17, 1969 the Court denied both of these motions, but the complainants' motion to amend the Third Amended Bill of Complaint so as to include a more explicit statement of the complainants' trust theory was granted.

Because of inconsistencies in the respective amendments filed on behalf of Mrs. Parish, on the one hand, and Messrs. Wharff and Wenger, on the other, a joint amendment detailing the trust theory was filed on November 5, 1939, after the commencement of trial.

Pursuant to the Court's pretrial instructions, pre-trial statements on behalf of all parties were submitted. The pretrial conference, itself, was held on October 17,1969.

Trial on the merits commenced on October 27, 1969 and continued four days a week for four weeks.

Mrs. Parish appeared pro se and did not offer any witnesses other than those offered by counsel on behalf of complainants Wharff and Wenger. With the exceptions of the complainants themselves all persons called by complainants' counsel to testify were called as adverse witnesses. (T. 7) In order of appearance, those who were called were William B. Hooper, former general manager and secretary-treasurer of the Association F. Upton Gladhill, a director, William I. King, a director Charles H. Miller, Jr., a director also, Dr. Oscar S. Martin, a director and J. Homer Remsberg, who was president of the Association from 1953 to 1964 and is a current member of the Board of Directors, also Edward C. Norman, a past director and president of the Association since 1964, James E. Click, current general manager and secretary-treasurer of the Association; Bernard C. Wenger, one of the complainants Ernest C. Clifford, a certified public accountant and a retired partner in the Wayne Kendrick Company, the accounting firm which served the Association as auditor until 1964; also, Wayne Kendrick, certified public accountant, and senior partner in the aforesaid accounting firm; Edward L. Merrigan, general counsel to the association since 1964; and Paul G. Snyder, now secretary of the Association.

Also called after the complainants' case had been first closed and then reopened upon motion and upon leave of the Court were Edward M. Wharff and Mrs. Theodore F. Parish.

Both prior to the calling of the witnesses and during the course of the trial there were certain stipulations that were entered into by and between the complainants and the defendants. Certain of these matters in pretrial related to uncontested matters; for example, with reference to the date of the sale of the cow herd by Mrs. Parish and other such matters.

(T. 8) At the close of the Complainants' case, this being on November 18,1969 the defendants moved to dismiss, and the Court reserved ruling.

Thereafter the defendants called certain witnesses – and it may be noted here, also, that in the main case of the complainants in this matter, in this cause, the defendants took occasion to utilize as their own witnesses most, if not all, of the witnesses called on behalf of the complainants.

With respect to the defendants' witnesses, the Robinson estate called Robert M. Goldman, an executor and former counsel of Mr. Robinson; Mr. Paul G. Snyder, previously identified, and James E. Click, also previously identified.

Also, the deposition of Colonel William J. Hughes, Jr., former general counsel of the Association, was admitted into evidence, and certain portions of it were read into the record in this case.

The stipulations during the course of the trial and near the end of the trial to which we have referred included one with reference to James E. Reilly, former attorney for William B. Hooper, as to the testimony that he would give, if called.

Also, with respect to Professor Frank Dugan, former dean at Georgetown University Law School, who had been chosen to conduct the investigation as to which we have heard much evidence in this case and the author of the so-called Dugan report.

Lastly, there was a stipulation that the defendant Directors, who had not been called, if called, would testify as to certain matters,(T. 9) including the absence of any collaboration with respect to directions to the accountants or as to any matters pertaining to the alleged conspiracy in this case.

At the close of the defendants' case, the defendants' counsel renewed their motion to dismiss, and ruling was again reserved.

The complainants then offered as a rebuttal witness Bernard C. Wenger, a complainant who had testified previously.

Thereafter, the defendants again renewed their motions to dismiss, and rulings on the motions were again reserved by the Court.

The aforegoing portion of the Court's decision has been prepared in advance because we felt it would be useful to set in the record at this point procedural background of this important and rather protracted litigation.

We are met at the outset in this case with contentions which have been heretofore raised and disposed of, in part at least, at the particular phase of the litigation at which they were raised. We refer mainly to the standing of the complainants in this case to sue. This was a matter of prolonged argument before the Court previously on motions for summary judgment and was the subject of an opinion by the Court related from the bench after the conclusion of the argument on the motions.

The Court has referred heretofore to the Court of Appeals' opinion as to which much has been said in this case, and we have had the benefit of a remarkable analysis in that opinion of the rather extensive Third Amended Bill of Complaint, which was so ably drafted by counsel for the complainants.

(T. 10) Of course, we are aware of the rulings of the Court on many aspects of the case by the Court of Appeals in a very comprehensive opinion by Judge Barnes.

At that time, in its consideration of the demurrers which had been sustained by another member of the Court, the Court of Appeals found that it could not be held as a matter of law that the complainants lacked standing to sue, particularly on the basis of the by-law provisions which are quoted in the Court's opinion.

It has come to light, of course, in the proceedings here that the by-laws were changed by action of the members of the Association in 1965, and such changes appear in the booklet dated in 1966 which has been received in evidence in this case. At the time of the consideration of the demurrer the Court of Appeals did not have before it these documents with respect to standing.

We now have before us a complete record, as complete as counsel have ably made it. At this time we cannot conclude on the basis of the law and the facts that the plaintiffs in this case have met their burden of showing that they have standing under the applicable by-law provisions to maintain a derivative suit as members of the Association.

When the by-laws were adopted, and we feel it is a critical factor in this case, they were producing members. They thereafter sold.

The Court's conclusion, after great consideration of all of the matters involves, is that with respect to this the complainants are bound by the new by-laws which were adopted and the full text of which appear in the record in this case.

(T. 11) This is not to conclude, however, that the complainants in this case lack standing to sue. It is the considered judgment of this Court that the plaintiffs do have the right to maintain this action and to do so upon what has been referred to time and time again in this case as a so-called trust theory.

It is, of course, basic that in a stock corporation a stockholder has no continuing interest in the corporation when, as, and if he disposes of the stock interest which entitles him to be known as a stockholder.

This is not the case, as we find it, in the situation presented here, which involves a membership association, a milk producers' cooperative, in which producers maintain a continuing proprietary interest as reflected by the revolving certificates which they receive, and which certificates, according to the evidence in this case of Mr. Snyder and Mr. Click and others, can be amended, can be increased and decreased from time to time.

We find, and we refer again to the cases which were adverted to at the time of the motion for summary judgment in this case, that cases in other jurisdictions, notably in California, which upheld the right of former members to proceed against an association in the sale of their produce, whatever it might have been, really present no distinguishable featur so far as this case is concerned.

If such former members had the right to sue for a fund actually in hand, it would seem to the Court an inequity, and grossly so, for them to be denied the right to complain of fraud or culpable mismanagement (T. 12) in matters affecting the disposition of milk produced by them during the course of their membership in the association and during a period of time with respect to which they received certificates.

In the course of argument here, today and previously, there has been a discussion, it has been urged upon the court, that there was an agency relationship here rather than a trust relationship, and the contract and by-laws in this situation are cited for the use of the agency terms.

In this wise we have referred to the treatises and to the cases. We think Scott on Trusts supports the position of complainants in this case; That they are not without remedy and there is a fiduciary relationship subsisting between the members and the Association as a result of the consignment to the Association of their produce.

It is urged upon the Court in this connection that to so find would bring about a catastrophic situation. With this we do not concur, and we say this for this reason:

Essentially, we think it would be borne in mind that the Cooperative Code provisions are cast in the mold of the corporation law of the State of Maryland. We do not hink that the simon-pure relationship that governs between cestui que trust and trustee are necessarily imported into the relationship that subsists between the Association and its members. See *Scott on Trusts,* Volume Five, Section 495, at page 3534.

In other words, we think there is a fiduciary relationship which gives these former members a right to maintain this action, but we, nevertheless, find and hold that the standard applicable to the directors upon the Bill of Complaint of the complainants in this case is the same standard as would apply generally with respect to the officers and directors of a stock corporation or a commercial organization which is a corporate entity. That standard we are all familiary with namely, that such officers and directors are liable for gross and culpable negligence.

The familiar provisions, also, we think, of corporation law would obtain here with respect to the right or not of a Court to intervene in the internal affairs of a corporate organization.

So that in this phase of it, we have concluded as we recited, and now will proceed to consider in light of the standards which we hold are applicable in this case, the complaints which have been leveled against the directors and former officers of the Association in the Third Amended Bill of Complaint, as supported by the Testimony and voluminuous exhibits.

We think at the outset, it should be noted that this organization has been in existence since the early 130's.

That all of the directors who appeared on this witness stand, all of the directors presently of the Association, are themselves farmers;

That they are producers

That they are, as Mr. Remsberg said, "Poor farmers, like myself," and he, of course, is and has been a farmer for many years, and none of the Directors (past or present) personally profitted from any of the transactions complained of.

We think it also appropriate to point out that this has been overall a successful organization. From very humble beginnings in the early '30's in a small office in Washington, D.C., with a gross business of something under or in the neighborhood of $20 million a year, as we (T. 14) recall it, it has become a large organization with headquarters in the State of Virginia, nearby Arlington, with a vast force of over 200 employees, with members aggregating 1100 in number and doing a gross volume of $50 million a year.

Over the years this association has responded to an urgent need, a public interest, the interest of the consumers of this area. They have succeeded in establishing at Laurel, according to the evidence here — and the complainants do not by any means cast any doubt upon this in their testimony nor argument — they have established at Laurel Maryland, a manufacturing plant for milk and milk products which is a model for such plants in this country, and, indeed, throughout the world.

They have established in nearby Virginia the MarvaMaid plant, a dairy plant which is also a successful operation.

The Court has read the annual statements of the Association and has noted that this association has been responsive and responsible in terms of things in addition to the sale of the members' milk. They have been concerned with pesticide control and with many matters pertaining to the technical aspects of milk production, to the health of consumers and, in general, to the public interest.

We have been impressed with the testimony of the directors who have appeared here and testified on the witness stand, impressed with these directors' integrity, with their industry, and, of course, with the fact, basically, that being producers their principal motivation, their own self-interest is furthered and fostered by the success and prosperity of the Association.

(T. 15) We think, also, that they have been in capable hands insofar as expert assistance is concerned. These gentlemen, who are farmers, have not relied upon their own resources insofar as their business decisions are concerend, although in this wise, too, some of them are bank directors and some are businessmen as well as farmers, and in these particular instances they have resorted to their own knowledge and experience.

By and large, these men have been producing farmers who have, when the occasion needed it, and it seems to have been rather frequent in the history we have been studying, when they needed expert advice – and the court is impressed with the fact – they obtained the most expert advice available. They did not rely upon their own judgment in areas where expertise was required.

This brings immediately to mind the acquisition of Embassy Dairy in 1954 and the evidence with respect to this acquisition, the sale of the dairy afterwards and the discount.

First of all, with respect to the acquisition in 1954, it has been ably and persuasively urged upon the Court that at that particular time the directors were grossly negligent in their decision to buy the Embassy Dairy from Mr. Ward in the light of anti-trust problems.

We find, in the first instance, that the price paid was a fair and reasonable price; we think that the motivation at that time did not constitute acts of gross negligence or fraud, as alleged, in the handling of members interests.

We further find, with respect to the acquisition of Embassy, (T. 16) that the Associates relied upon counsel who are most able in the field; that it would have been most unwise of them to have done otherwise, especially in the field of anti-trust litigation, with which the Court has had some familiarity.

Here the record shows that the general counsel of the Association at that particular time was William E. Leahy, a man of eminent background, now deceased, in the District of Columbia, a prominent attorney, prominent not only locally but nationally, former dean of a law school in Washington, D.C., an outstanding trial lawyer and one of the most able and respected members of the District of Columbia Bar.

Mr. Leahy and Colonel Hughes at that time represented the Association together, and Colonel Hughes' credentials are similarly most impressive, as set forth in his deposition and in the exhibits.

But, not relying upon their own expertise in connection with these acquisitions, these eminent lawyers sought the expert advice of the former Assistant Attorney General in charge of the Anti-trust Division of the Department of Justice, Mr. Bergson, and his partner, Mr. Bortman, who had also a prominent position in the Department of Justice Anti-trust Division.

Mr. Bergson's reputation in the field of anti-trust in private practice is well known to the Court, and he was, of course, well qualified to be the head of the Anti-trust Division.

Divestiture was not an uncommon thing. Divestiture at that time had occurred in other situations, situations perhaps more costly and more serious than in the one that obtains here. Certainly, it is not (T. 17) conclusive of gross negligence or fraud.

But the signal and the important consideration here, in the Court's mind, is that these producer- directors who were mostly farmers did not rely upon their own judgment but sought this kind of able counsel, and this kind of able counsel found that there was no anti-trust problem.

Of course, two years later they found, I am sure to their dismay, that the Department of Justice, the District Court for the United States for the District of Columbia through Judge Holtzoff and ultimately the Supreme Court of the United States, took a different view.

It has been said with reference to this that we find nowhere a written opinion with respect to how these eminent counsel stood. The suggestion is made that perhaps they didn't know the real motivation for this acquisition.

This indeed stretches the reasonable limits of credibility. These were eminent men, experienced counsel who, we are confident had full details with respect to this transaction at the time of their conferences with officials of the Department of Justice and would not, because of their experience and integrity, have recommended embarking upon the acquisition unless, first of all, knew all aspects of it, and, secondly, felt, on the basis of their best judgment and their knowledge, that this acquisition was reasonable and reasonably impervious to challenge by the authorities.

In this respect, too, we note and find that the Department of Justice Anti-trust Division did not say they could not go ahead with it. There were circumstances here where the obligation of the contract with (T. 18) Mr. Ward required the placing in escrow some $100,000 at a date shown in the record. And it appears that the Department of Justice, according to the exhibits as we recall them, assented when Colonel Hughes reported to the Department the day after the closing on Embassy,assented that they had previously gone on record as saying, "If we have any objections,we will let you know." And they were supposed to do this by a date certain, prior to the closing.

There was no mistake on the part of Colonel Hughes and his eminent partner, William E. Leahy, at that time in going forward with this transaction.

We find, from the Plant Committee minutes and the minutes of the minutes of the Board of Directors of the Associates, they were fully briefed and apprised by counsel and relied upon counsel before proceeding with the Embassy acquisition.

This was a business decision, therefore, to acquire it. Circumstances later proved that their judgment, on the basis of judicial decrees, was wrong.

But there are numerous precedents in the law reports of Federal decisions where such business and professional judgments have been proven wrong. We find here no basis for the contention that the directors' mistake constituted gross or culpable negligence.

In connection with Embassy there is also the matter of the acquisition during the pendency of the litigation by the Department of Justice of the Richfield-Wakefield Dairy, which has been assailed by the complainants in this case as being sheer and gross negligence because (T. 19) at that time that anti-trust proceedings were already pending.

We recall, however, an unequivocal communication from Mr. Bergson in the record in this case that in his judgment this acquisition was protected by the Capper-Volsted law. It was on the basis, so far as the legalities are concerned, of his opinion that it went forward, and Judge Holtzoff's decision sustained the purchase.

As to the business aspects of it, as to the business judgments exercised by the defendant directors, it appears to the Court that at the time they made this acquisition, while we may now debate its wisdom, on the basis of the facts as they appeared to them, this cannot be said to be a grossly and culpably negligent decision for them to have made. They made it at a price which was not an unreasonable price. They made it at a time when the customers of that particular dairy represented a substantial segment of the market. To them undoubtedly it seemed that this was, especially in the light of the fact that the company was in debt substantially to the Association, that this was conceivably a way of protecting themselves in acquiring not only a dairy and its customers but also its physical properties. This was not an indiscreet or unwise decision. We may quarrel with it now many years after the fact, but the Court cannot say as a matter of fact or certainly as a matter of law that the acquisition of Richfield-Wakefield was a mistake of negligent or grossly negligent (T. 20) proportions.

To pursue further the matter of Embassy, we advert not at this juncture to the divestiture to which we have referred following the appeal to the Supreme Court of the United States.

Parenthetically, we do not agree that this was a fruitless appeal. Monies had to be expended, of course, in counsel fees, but these eminent counsel recommended to the Association's directors that this Association had more than a 50-50 chance. As a matter of fact, we recall in the communications of the manager that they had a better than 90 percent chance of reversing Judge Holtzoff.

This is not a situation where inexperienced counsel are making irresponsible recommendations to a client, but eminent counsel are making it on the basis of the record then made. It seems to the Court that the appeal was properly pursued.

With respect to the divestiture which gave them a year, the Court recalls the testimony of Mr. Hooper, the then Manager, that he wanted to "string it out" as long as possible because of the profitable nature of Embassy.

We have examined all of the exhibits and have carefully considered the testimony concerning the sale of the "Embassy Division." We are familiar with the testimony with reference to, first of all, the Association's important concern that any prospective buyer be identified. They had, (T. 21) of course, a responsibility to themselves, to their producers, to their members and this community that the purchaser be a responsible purchaser. They had a responsibility to themselves that the market represented by Embassy continue to be available to the Association.

They had a responsibility, of course, to protect themselves. They had a responsibility to answer the mandate of the United States District Court and were required to report to that court periodically under its mandate:

Mr. Phillipson's letter is in the file, as the Court noted in the early stages of this case, with a $4 million offer. But the identity of the Phillipson purchaser, whoever he was, was not disclosed.

There were others, similarly unidentified, and there were the employees, of course, of the Embassy Division who had not the means to finance such a purchase. And finally we have the communication from Mr. Berger.

The Court, when we read the Bill of Complaint and the Court of Appeals opinion in this case, had no idea who Mr. Berger was. In the trial in this action we have heard and have had him identified as a man of very substantial means living and doing business in the District of Columbia, receiving the highest recommendation of the Riggs National Bank of Washington, D.C., one of the most responsible financial institutions in the area, if not the country, a recommendation (T. 22) made to Mr. Hooper, made to Mr. Miller, who himself was a banker and who is a correspondent of the Riggs National Bank. We have information here with respect to this man's assets aggregating $20 million, and we know from the testimony in this case that he is related to a family of wealth, the son-in-law of Mr. GArfield Kass, and together with Mr. Kassing having developed the Seven Corners Shopping Center, a very substantial commercial enterprise in nearby Virginia.

So it must be said that, with respect to this man, his signature was indeed better than a lien on the property, and we so find in this case.

It may well have been that the directors should have obtained not only his signature as an endorser, but, also, a lien on the property. That was not the option available by the purchaser. It wasn't made available to the directors. They had their option and they chose to get his signature and, as the record show, they protected themselves with respect to a waiver of the wife's dower interest.

So it seems to the Court that they did everything they responsibly could do. The Court does not find in the record any specific reference to a discussion about an accleration clause in the note, which certainly, in retrospect, would have been desirable.

It has been suggested to the Court that this was not part of the option offered by Mr. Berger and on the facts it seems clear that the absence of an acceleration clause was not an act of fraud or culpable negligence. The absence of an acceleration clause in the note caused some alarm in the Association, at least in the upper echelons of the Board, and to the general counsel at the time of the public notice of the sale by Berger or Metropolitan Foods and later Eastern, the name of Metropolitan Foods having been changed to Eastern, when there was a newspaper article about the sale of Embassy to Southland being the corporation which owns the Seven-Eleven Stores and in this and many other communities, a very responsible purchaser.

The Court has read all the correspondence between Mr. Merrigan and counsel for Mr. Berger. Mr. Merrigan acted in a very aggressive and businesslike and lawyerly way, bringing counsel for Mr. Berger to a willingness to discuss what would be done with respect to the long-term obligation between the Association and Mr. Berger under the terms of the sales agreement. Mr. Berger was then in possession of millions of dollars in cash as a result of the sale by him of the Embassy Dairy to Southland. The situation was disturbing even though Mr. Berger was a man of great wealth and reputation. On the other hand, Mr. Berger was plainly anxious to avoid the possibility of suit clearly suggested by Mr. Merrigan.

So it was a matter of concern to the Association's directors. Without a lien on the assets of Embassy, should they wait out the period of time for the payment of the notes guaranteed by Mr. Berger or press for some other solution? And these directors sat down to consider Mr. Berger's proposals made through his counsel, Mr. Reilly, that there be a discount, and that the full amount of the money under the Berger note should be paid off then rather than under the provisions of the contract.

It is significant here, we think, that $500,000 a half-million dollars would not have to be paid by Mr. Berger for a period of some twelve years, ten or twelve years, as of the date of their negotiations. We think that the directors very carefully considered this. They made a business judgment at that particular time that in that situation the discount should be made.

Among the circumstances they considered were the facts that they were faced with the necessity for substantial borrowings that year and the next year in connection with the revolving fund certificates, and something in the area of $1 million that year in connection with Marva-Maid and other operations; and on the basis of their best business judgment they considered that getting substantially paid then was much better than waiting for the period of time to which we have referred.

In the process, the Association came into possession at that time of cash money in excess of $2 million, as we recall it $2,200,000, with which to finance their operations. There is credible testimony in the record that by so doing they saved a substantial amount oif interest in borrowings.

Overall, we find that the discount arrangement was an act of reasonable business judgment, debatable as such judgments are, but certainly not an act of negligence. It has been attacked for very cogent reasons, persuasively urged upon the Court. Mr. Hooper, for example, said they should "ride" with it, that he did not consider the discount "necessary". Some of the directors may have held the same view. We do not recall the vote at this point, but a substantial majority of the Board voted to approve the discount. In retrospect we think, and current events probably support the conclusion with high interest rates at the present time, that their decision was all-in-all a reasonable act of management.

As footnotes, perhaps, to what we have stated, and so the record will show additional facts supporting our conclusions we refer also to the appraisals that were made of Embassy at and prior to the sale to Mr. berger by a nationally recognized organization of appraisers, that the results of the acquisition of Embassy during the period of time that they held it, notwithstanding argument to the contrary by the Complainants, the results were profitable to the Association during the period from 1954 to 1960 that it was held by them.

Other facts also to be borne in mind, going back to the original Embassy acquisition, were that these matters were carefully considered. The financing was arranged through the Baltimore Bank of Cooperatives. The Department of Agriculture supported the acquisition of Embassy. One thousand members of the Association participated in financing of it by their subscriptions. The Association's agents and representatives at district meetings of the Association throughout the various districts presented to the members of the Association the facts with reference to the acquisition and the method of financing, as they later did with the Dugan Report.

We do not think, either, that the record supports the conclusion by any means of able counsel for the complainants that there were fictitious profits in connection with the adjustments to certificates, fictitious profits with reference to the operation of Embassy, and we think that this is evident from the testimony of Mr. Kendrick, as summarized in the findings presented to the Court by the Defendant Kendrick.

Without taking the time to refer at this point to the brief of the defendant, Kendrick, at page six of the brief which was submitted to the Court as of yesterday, the price of the milk was adjusted in accordance with the policy which had been formulated by the Board of Directors and fully acquiesced in, according to the evidence, by the membership, to a Class III price which, in effect, netted a profit in the operation of Embassy Dairy in the amount of $245,958.12.

As it is here stated, this was not a fictitious profit, it was a profit which was paid to the members, because this amount was transferred to the revolving fund for the benefit of the membership.

They received, we think the evidence shows, treatment at the hands of the directors and of management in accordance with the precise method of financing which had been approved in the initial consideration of the acquisition by the Baltimore Bank of Cooperatives and by the other agencies involved.

Now, we have referred to the matter of the Embassy acquisition, its purchase, its sale and the discount, and in this phase of the case the Court finds that the complainants have not sustained the burden of proof that there was, in respect to these transactions, (T. 27) conduct on the part of the defendant directors or any of the defendants involved, which consisted of or could be categorized as grossly negligent or culpably negligent conduct on their part.

We come now to the next phase of this case, the acquisition of Harrison and this episode involving Mr. Hooper, the then General Manager, and Mr. Robinson, who had been the former owner of the Laurel Plant and who had been its Manager from the time of acquisition by the Association until the time of his discharge in late 1963 and early 1964.

The evidence shows here clearly, unequivocally recognized, of course, by the Association directors then, by everyone now, a clear conflict of interest in the acquisition by Mr. Hooper and Mr. Robinson of the plant in Florida and the incorporation of it under the name of Harrison Dairy. This was a conflict of interest which was brought to the attention of Mr. Remsberg in August of 1961.

We think it important to point out at the outset of this episode that at that time the directors were not aware of the transactions with reference to 'phamton brokerage" through the use of this corporate entity which came to light during the Dugan investigation in late 1963 and 1964, at this particular time Mr. Homer Remsberg, the then President, considered that there was indeed, when it was brought to his attention, a conflict of interest and he remarked, "This cannot be."

It has been urged upon the Court that certain actions should have been taken much sooner than they were. The record does show in this case that Mr. Remsberg, after talking with Mr. Gladhill of this (T. 28) county, whom he referred to as one of our most responsible directors," then took it up at the next meeting of the Board of Directors. It was determined that something should be done immediately. And the record shows the appointment of a Committee including at least two members of the Executive Committee to make a trip to Florida to examine the Harrison facilities.

The Plant Committee had a meeting down there in Florida and their minutes are in the record. There was thereafter a meeting of the Board of Directors in Arlington, at which time the question of acquisition of Harison was considered.

It has been urged upon the Court that this was a foolish and unwise thing to do, to purchase this facility because it was solely to get rid of a conflict of interest. There is some surface appeal to this argument. However, upon analysis, it appears to the Court that there were other considerations involved which had to be taken into account, and we think it is a legitimate inference from the evidence that they were taken into account at that time.

The evidence before us as to the Florida market, establishes that it was not inconsequential by any means, but rather an important market that the Association had been selling to previously through Galloway West, an organization that was taken over by Borden's. Mr. Hooper's testimony disclosed to the Court the importance of this market and the difficulty of getting in there because of permit restrictions.

At the time the Board had before it for consideration the decision of what to do about Harrison, the alternatives would include, (T. 29) perhaps, the sale of it to a competitor, not a wise thing to do. Or the sale of it to some outside party. In either eventuality, the Association would lose its foothold in Florida.

We cannot say at this juncture that their decision, which we think was really a two-fold one, to get rid of the conflict of interest and to pick up a facility comparable to others we have heard of in this record, a facility that could be of value to the Association, was an unwise or negligent action.

The price that they paid for it was been referred to many times in this proceeding, and we note the exhibit here in evidence which had stated what the actual book value was and the spread between the book and the price which was paid, as we recall it, a difference of something in the magnitude of $40,000 or $50,000.

The directors who testified on the stand with reference to this gave their opinion that at that time it was considered to be a going concern worth more than its book value, and it was on this basis that it was purchased and merged into the Fluid Division.

The Court cannot say, on the basis of the record before us, that this was an unwise thing to do at that particular moment and that the Directors were grossly and culpably negligent for so doing.

The conflict of interest was indeed plain, but the true proportions of it did not come to light, so far as the Board was concerned, until later events — culminating in Mr. Click's memorandum to the Board and his resignation, which was declined.

The action of the Board at that time, on the basis of Mr. (T. 30) Click's charges, was to cause an investigation to be made as to all aspects of the Hooper-Robinson involvements. We find that the Board acted very responsibly at that time in the face of a festering problem in the corporate family — a large corporate organization with a public interest involved.

What they did at that juncture – and how it was done – was critical to the future of the Association. They chose at that time to have a confidential fact-finding investigation by Professor Dugan of Georgetown University Law School, a person described in this record as one of the most renowned men in the country in that specialty, certainly a man of great eminence and integrity.

The evidence in this case shows abundantly that there was complete cooperation between Professor Dugan and the defendant directors, that they gave him a carte blanche, the only restriction being that he was not to interview a competitor; the Association would make all of the books and records available, all directors would be made available.

Mr. Robinson did appear more than once, we recall three times, and without counsel. Mr. Hooper fully cooperated. Professor Dugan made a complete and confidential report, public disclosure of which would have been unnecessary and ill-advised.

Then we think it is important, also, that this special counsel joined with the general counsel of the Association in recommending to the directors after the investigation, which underscored the Harrison conflict of interest and the "phantom brokerage" involving Harrison and Mutual at Oneida, New York, that there be a settlement with Hooper and (T. 31) Robinson of the controversy which thereafter arose.

(The record shows here the calling in of Mr. Hooper and his firing. It also shows, of course, the failure to renew the contract of Mr. Robinson. It shows, in effect, the discharge of both of these individuals.)

Their claims against the Association were not insignificant, Mr. Hooper claiming unpaid compensation and damages and Mr. Robinson making like claims. Each was represented by experienced counsel.

It can be argued, certainly on the basis of established law that a faithless employee forfeits his entitlement to deferred compensation and other benefits. Counsel for the Complainants have cited authority in their very thorough proposed findings along this line. If the case were now to be tried before this Court as to the entitlement or not of Mr. Hooper and Mr.Robinson for compensation based upon wrongful discharge, it seems clear under the authorities cited that their standing would be short-lived.

It is important to note, however, that the matter was in a state of threatened litigation on both sides. It was not in court, it was before counsel at a time when it was the desire of both parties to attempt to compromise a difficult problem, where both parties, Mr. Hooper and Mr. Robinson and the Association, were represented by counsel that counsel met in negotiations not on a friendly basis but as complete adversaries, and this is clear from the tone of the communications received in evidence.

So we find the settlement which eventuated here with the (T. 32) assistance of counsel, though it can be criticized, at this stage, represented in the context of the circumstances at that time and as they appeared to the Board – on the basis of the evidence and of recommendations of counsel – a settlement that was fair and reasonable.

It is the essence of settlements that neither side in such situations is completely happy with what eventuates. It is significant here that this settlement was reached not only up on the recommendation of the general counsel but upon the recommendation of the special counsel who had spent weeks in sifting the evidence, who had become close to the problems of the Association and who had had the benefit of Mr. Kendrick's audit of the Harrison books, his audit of the sales slips of Mutual, and his financial analyses.

As a parenthetical footnote, again, we think it should be noted here with respect to the then President of this

Association, J. Homer Remsberg, and his involvement at that time with its affairs, that the Court has been impressed with this man's sinserity and his integrity and his dedication to the interests of this Association over the Years, and, beyond that, his dedication to the interests of dairying in this State and Nation.

There is a long, shall we say, litany of his distinguished affiliations, of honors that have been bestowed upon him in connection with his long and extensive years as a diaryman, as a farmer, as a leader in the dairying movement.

The evidence discloses that Mr. Remsberg, the president for more than 15 years, was paid the nominal salary of $6,000 per annum, (T. 33) that he declined raises that had been proffered to him by the Association. He testified on the stand very truthfully. We find this is also true of the present chief executive officer, Mr. Norman, and the other directors, who testified. We think that Mr. Remsberg rendered valuable service to this Association during the years of his presidency and, as we recall, this was recognized in a very eloquent tribute to him which was adopted by the membership of the Association at its annual meeting after his failure or re-election in 1964.

Neither Mr. Remsberg, nor any other officer or member of the Board of Directors, nor its able General Counsel, Mr. Merrigan, can fairly be accused of a "suppression" of the Dugan Report. Former counsel for Mr. Parish was, as the record shows, accorded an opportunity to read it. The members of the Association were given a comprehensive summary of it.

We have also been impressed on the stand with the demeanor of Mr. Kendrick, the certified public accountant who was a defendant in this case. Mr. Kendrick, who is the senior partner of Wayne Kendrick and Company in Washington, D.C., has been a certified public accountant beginning in North Carolina and then later in Washington, D.C. for almost half a century.

He has had important commercial accounts, some of which have been elicited upon his direct examination or cross-examination in this case. Mr. Kendrick has represented banking institutions such as the Union Trust Company and the American Security and Trust Company of Washington, D.C. He and his firm have been the accountants for Group (T. 34) Hospitalization, Incorporated, and for colleges and universities and many other substantial clients. We believe, Mr.Kendrick when he says that he had no contact with the officers and directors of this Association until the time of the Dugan report and investigation, at which time it was suggested, and we think, properly, by the Board of Directors that Mr. Clifford be replaced for this particular operation by the senior partner, Mr. Kendrick.

We believe Mr. Kendrick when he says that he had no occasion at all to discuss the preparation of financial statements with members of the Board of Directors except at the few Board meetings he attended at the time of the Dugan investiation.

We believe this is a man of substantial integrity and we do not find that the evidence in this case sustains the contention that there was any conspiracy on his part to conceal, misrepresent, or defraud or in any way do anything other than follow sound accounting principles and practices.

Resourceful counsel have very ably argued to the contrary. Notably, it is contended that a footnote to the financial report of the Association after the Dugan Report when further investigation was to be made of the Laurel Plant, did not fully disclose this fact to the membership. It is the Court's considered judgment and conclusion that this was proper accounting practice; that both Mr. Kendrick and Mr. Merrigan who worked jointly in the preparation of the footnote upon instructions from the Board of Directors acted fairly and responsibly. This was a financial report going not only to the members of the (T. 35) Association but going broadly into the community, including the financial community and the competitive community, and it seems to the Court would have been the essence of irresponsibility to spell out in that document that we are investigating the Laurel Plant for alleged improprieties and to put the world on notice of what has been referred to as "family problems" or "dirty linen".

And we note in thic connection, too, there has not been adduced on behalf of the complainants in this case the testimony of any certified public accountant that the reporting and audit procedures of Mr. Kendrick and his Partner, Mr. Clifford,were not proper accounting procedures and not proper reporting. The burden, naturally, would be upon the complainants in this respect.

Now, what of the Hooper and Robinson releases?

In its review of this aspect of the case, the Court of Appeals of Maryland wasruling upon a demurrer and did not have the benefit of the full and rather complete review of all the facts which have come before this Court in this record.

With respect to the liability or not of the defendant directors, we have heretofore ruled that with respect to the settlement there was no negligence on their part, no culpable negligence shown. With respect to the narrow question presented as to whether or not the estate of Robinson and the defendant Hooper may avail themselves of the release which was executed in March of 1964, it is the conclusion of the Court – based upon all the evidence here – that they can and that this release bars the claim against them.

(T. 36) At the time of the execution of the joint release (it, of course, was a joint release with respect to both Robinson and Hooper) there had been a complete investigation at the instance of the Association of the charges which Mr. Click had very responsibly, as Judge Barnes said in his scholarly opinion, brought to the attention of the Directors.

There had been a complete sifting of all of these conflicts of interest and we think the record does support the finding urged upon us by the defendant directors and by Robinson and Hooper that at that time there were before the directors the facts requisite for them to enter into a release transaction between the former employee, Hooper, and the former manager, Robinson, fairly and knowingly.

These were, as has been pointed out, very specific releases relating precisely to the particular transactions giving rise in this case to the claims of defalcation and breach of fiduciary duty on the part of Robinson and Hooper.

We have heretofore found that in working out the terms of the settlement, the figures were reasonable and that there was no mismanagement on the part of the directors.

We find, with reference to the matter of disclosure, that through the Dugan inquiry and the reports of Mr. Kendrick, in addition to the testimony of Hooper and Robinson before Professor Dugan, the Association was possessed of facts requisite to an arms-length transaction, and that the evidence now of record satisfies the requirements of the law of Maryland as set forth in the opinion of the Court of Appeals in the prior appeal in this case.

With respect to a more detailed presentation of the Court's findings, including references to specific Exhibits and case law, we adopt the proposed findings presented to the Court on behalf of the defendant directors to the fullest extent not inconsistent with the foregoing. We do not sustain but, rather, overrule the contentions that any of the claims are barred by laches, but this is not essential to the decision and determination of the merits in this case.

We will request counsel for the defendants to present an order in accordance with the Court's oral decision in this case, granting the motions of the defendants, and all of the defendants, dismissing the Third Amended Bill of Complaint.

We conclude, gentlemen, as we began, that the case has been ably presented. Counsel have been most courteous and helpful to the Court and we think it appropriate, also, as we had occasion to do in communicating with the Clerk of the Court at the conclusion of the trial, to commend our courtroom clerk, Mrs. Jean Belt, for her very, very loyal and diligent help during the course of these proceedings and her careful handling of the voluminuous exhibits in this case.

PETITION OF WHARFF ET AL FOR REHEARING WITH EXHIBIT A

(Fd. January 14, 1970,
Denied February 4, 1970, Panely)

To the Honorable the Judge of said Court:

Complainants Wharff and Wenger pray the Court to grant them a rehearing in the above-entitled case and in support thereof say:

1. While the Court has not as yet entered a final Order or Decree herein, its Opinion, delivered orally on the 16th day of December, 1969, and subsequently served on these Complainants' counsel, clearly expresses the Court's intention, and reasons supporting the same, to deny all relief requested by the Complainants other than a declaration that the Defendant Association is an incorporated trust, holding its property and assets in trust for its members and past members as their interests may appear.

2. These Complainants respectfully urge that the Court reconsider its expressed conclusions, and grant a rehearing with respect thereto, for the following reasons (without waiving any other or further reasons or objections which Complainants would be entitled to assert in the event of an appeal from such final order as the Court might enter, if adverse to them):

(1) The Court's injunction entered December 4, 1968, by which Complainants were denied the right to communicate freely to other members any facts discovered by them through proceedings in this case, was clearly contrary to the Opinion of the Court of Appeals herein, and specifically its ruling that every member has an absolute and unrestricted right to obtain full information as to the Association's affairs; a necessary corollary of which ruling is that every member has an unrestricted right to communicate such facts, when

discovered, to any and every other member. Such ruling of this Court was highly prejudicial to Complainants' position in this case (a) because it prevented them from making any effective solicitation of other members to support them and share the expenses of this burdensome litigation; (b) because it prevented them from effectively opposing or seeking to overthrow deleterious action proposed to the membership by the Defendant directors or committees appointed by them, including particularly by-law amendments designed to cancel Complainants' membership, in violation of their contract rights as producers, upon temporary cessation of milk shipments, as well as the assumption by the Association during these proceedings of the litigation expenses of the Defendant directors herein, and (c) because the continuance of such injunction now imposes a crushing burden of expense on these Complainants in the event of an appeal herein, since they will have no effective means of affording other members the opportunity to join them and share such expense. The said injunction and its effects as above stated have, further, resulted in prejudicial representations to this Court by the Association, under the control of the Defendant Directors, and a Committee appointed by them which purported to represent "the majority of the members" in opposing this suit, such Committee being wholly ignorant of the facts on which the suit was based as shown by the testimony of its Chairman that he had not even read the Opinion of the Court of Appeals herein.

(2) In view of the Court's determination that the Association is an incorporated trust and holds its assets and property in trust for its members and former members as their interests may appear, the Court's conclusion that the standard of care required of the corporation's directors in administering such trust is no different from the standard applicable to directors of an ordinary business corporation, is contrary to the established law applicable to such trust relationships as uniformly applied by courts of equity.

(3) The conclusions of law reached by this Court in its opinion, holding that the Defendant Directors are excused from liability for proved acts which the Court of Appeals characterized in its opinion as constituting "gross negligence and culpable mismanagement," are wholly at variance with the law of the case as determined by the Court of Appeals herein, as will more fully and at large appear from the "Proposed Findings of Fact and Conclusions of Law" submitted to the Court by these Complainants, a copy of which is attached hereto, marked "Petitioners' Exhibit A" and prayed to be taken as part hereof.

(4) The particular conclusion of law reached by this Court in its Opinion, holding that the Defendants Hooper and the Executors of Arthur V. Robinson were effectively discharged from liability by the releases executed by the Association, is directly contrary to the Opinion of the Court of Appeals holding that said Defendants as fiduciaries had the burden of establishing the fairness of the release transactions in the light of facts known to them (including of course their liabilities), and of fully disclosing all material facts bearing on such liabilities; these Defendants having furnished no exculpatory facts as required by the Appellate Court, as will also more fully and at large appear from "Exhibit A".

WHEREFORE, Petitioners respectfully pray:

1. That the injunction against their communicating facts discovered by them to other persons and particularly members of the Association, be forthwith dissolved;

2. That this Court grant them a rehearing as to the foregoing Points (2), (3) and (4);

3. That your Petitioners may have such other and further relief as the nature of their Petition may require.

AND as in duty bound, etc.

OPINION
Filed May 5, 1971

Before HAMMOND, C.J. BARNES, McWILLIAMS, FINAN, SINGLEY, SMITH, DIGGES, Judges.

BY JUDGE McWILLIAMS:

The principal question before us is whether the judgment of the chancellor, Moore, J., in the light of Maryland Rule 886, is clearly erroneous. Resolving that question was as arduous as stating it was easy. The events which provoked this litigation were set in motion early in 1954. The original bill of complaint, however, was not filed until February 1965. The second amended bill of complaint was filed in July of that year. The third amended bill of complaint (and its accompanying exhibits) was filed on 28 February 1967 and on 29 March the chancellor, Pugh, J., sustained the demurrers of the defendants. In *Parish v. Maryland and Virginia Milk Producers Ass'n, Inc.*, 250 Md. 24, 107 (1968), we reversed his order and remanded the case for further proceedings.

Judge Barnes, who wrote (74 pages) for the Court in *Parish*, though the third amended bill of complaint (the bill) "with its eight exhibits *** a rather formidable document," consisting of "84 printed pages." No less formidable is the transcript of the record which has come back to us from the Circuit Court for Montgomery County. The docket entries take up 28 printed pages. They show that the chancellor held no less than 15 hearings on motions of one kind or another and that the trial on the merits went on without interruption for four weeks. The transcript weighs over 100 pounds; the record extract and the briefs occupy in excess of 3,000 printed pages; a dozen or more pleadings (over 100 typewritten pages) have been filed since the oral arguments.

Because Judge Barnes has provided us with a full discussion and explanation of the bill, the exhibits, the identity of the parties, and the many allegations and charges set forth in the bill, we shall limit our comments in this regard to the few changes which have taken place since. (At this point, of course, one ought to lay aside this opinion and read carefully what Judge Barnes has said in *Parish* beginning with page 34 and continuing through page 71.) On 5 November 1969 the bill was further amended by the addition of new paragraph No. 28[1]; the prayers for relief were amended by the addition of paragraphs 4A, 4B and 4C.[2] Wayne E. Lenn, Edwin R. Lenn, J.A.B. Dahlgren, and E.

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[1] "28. (A). That an actual and a justiciable controversy exists between the Complainants and the Defendants, and particularly the Defendant Association, on a number of issues, one of which is the legal relationship between the parties and the duties that flow therefrom.

"(B) That the Defendant Association is a non-profit, non-stock corporation which has, pursuant to its Articles of Incorporation and By-Laws (Exhibit C) and Complainants' Contracts (in form of Exhibits A and B) taken possession and control of milk produced by its members, handled, processed, and marketed the same, etc. for the benefit of its members, and is still doing so. The Defendant Association has possession, control and legal title to money, personal and real property acquired by withholding and investing net proceeds from the sale of members' milk, which property is held for the benefit of its members including Complainants in shares unknown to them.

"(C). That the relationship between the Complainants and said other members, and Defendant Association, is one of Trustee and Beneficiary, involving a fiduciary duty by the Trustee and Co-Trustees to account and disclose voluntarily to the Beneficiaries all they know or that has come to their attention which may be material to the Beneficiaries for the protection of their interests.

"(D). That Defendant Association in its Answer to the Third Amended Bill of Complaint denies the existence of a trust relationship.

"(E). That the request for a declaratory judgment is necessary in that the determination of a trust relationship is basic and fundamental to the determination of the many questions raised in this case, and to assure that major wrongs still concealed will not become res adjudicata.

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1 (Continued).

"(F). That the Complainants, and each of them, are members and representatives of the entire class of milk producers of the Association, and as such are entitled to maintain this class action as beneficiaries of a trust, namely, the Maryland and Virginia Milk Producers Association, Inc., incorporated and operated exclusively for the benefit of its members constituting said class, to recover on behalf of the said trustee and the members of the said class any and all money and property arising out of the matters hereinbefore alleged in this Complaint."

[2] "4A. Complainants respectfully pray for declaratory judgment that under the conditions recited hereinbefore in the Twenty-Eighth paragraph, the legal relationship of the Defendant Association to its members is that of Trustee and Beneficiary and, accordingly, the Defendant Association is under such fiduciary duty of a Trustee to voluntarily account to and disclose to its member Beneficiaries all pertinent matters pertaining to all transactions by the Defendant Association in connection with its handling, processing, and marketing, etc., of the milk produced by its member beneficiaries and to render a financial accounting to its Beneficiaries for the proceeds and considerations received by it in the marketing of said milk and all by-products thereof.

"4B. That this Honorable Court enter a Decree declaring that the legal relationship of the Defendant Association and its members and producers who have shipped milk to it was and is, respectively, that of trustee and beneficiary.

Irving Eldridge were allowed to withdraw as parties plaintiff.[3] The number of defendants was increased by service on 12 additional directors, William B. Hooper, a former officer of the Association, and Wayne Kendrick, its former auditor. Frank Parish was dismissed as a party plaintiff by the order of 3 October 1969, from which order he has appealed.

The trial on the merits was concluded on 19 November 1969. The chancellor heard arguments of counsel on 16 December and on 5 January 1970 he gave orally in open court his reasons for dismissing the bill. This able and comprehensive opinion occupies 30 printed pages of the record extract. We shall make liberal use of it. The final decree was filed on 15 January. All petitions for a rehearing were dismissed and this appeal followed.

The Maryland and Virginia Milk Producers Association, Inc. (Association), is a farm cooperative organized and functioning as such under Code (1966 Repl. Vol.), ARt. 23, § 349. For the past half century it has been engaged in the

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2 (Continued)

"4C. That this Honorable Court enter a Decree that any and all funds or property recovered by the Defendant Association in this suit shall be accounted for by the Defendant Association in that class of its membership represented by the Complainants in such amounts and proportions as this Honorable Court might determine, in accordance with the respective rights of the members of said class as beneficiaries of the trust described in Paragraph 28 of this Amended Third Amended Bill of Complaint."

[3] Four others–the Main brothers, Eader and Lowman–were allowed to intervene as parties plaintiff. Some months later they were allowed to withdraw, not without opposition by Wharff and Wenger, however.

collective marketing of milk and milk products for its members. They are the family and corporate farming entities who ship their milk to the Association. As the chancellor put it:

> "*** [T]his has been overall a successful organization. From very humble beginnings in the early '30's in a small office in Washington, *** with a gross business *** in the neighborhood of $20 million a year *** it has become a large organization *** with a vast force of over 200 employees, with members aggregating 1100 in number and doing a gross volume of $50 million a year.
>
> "Over the years this association has responded to an urgent need, a public interest, the interest of the consumers of this area. They have succeeded in establishing at Laurel, according to the evidence here—and the complainants do not by any means cast any doubt upon this in their testimony nor argument—they have established at Laurel Maryland, a manufacturing plant for milk and milk products which is a model for such plants in this country, and, indeed, throughout the world."

Dean Dugan, about whom we shall say more later on, thought that the Laurel Plant "was operated in a highly efficient manner and that it returned extraordinary gains to the Association."

The affairs of the Association are managed by 21 directors each of whom is elected at local district meetings of the members. The districts are located in Maryland, Virginia, West Virginia and Pennsylvania. The elections are ratified at the annual meeting of the entire membership. Each director receives $25 per meeting to reimburse him for the cost of attending. The chancellor commented that the directors are farmers and producers and that none of them "personally profited from any of the transactions complained of." He went on to say:

> "[We have] been impressed with the testimony of the directors who have appeared here and testified on the witness stand, impressed with these directors' integrity, with their industry, and, of course, with the fact, basically, that being producers their principal motivation, their own self-interest is furthered and fostered by the success and prosperity of the Association.
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> "We think, also, that they have been in capable hands insofar as expert assistance is conserned. These gentlemen, who are farmers, have not relied upon their own resources insofar as their business decisions are concerned, although in this wise, too, some of them are bank directors, and some are businessmen as well as farmers, and in these particular instances they have resorted to their own knowledge and experience.
>
> "By and large, these men have been producing farmers who have, when the occasion needed it, and it seems to have been rather frequent in the history we have been studying, when they needed expert advice–and the court is impressed with the fact–they obtained the most expert advice available. They did not rely upon their own judgment in areas where expertise was required."

There are three main committees of the board of directors. The Finance Committee has jurisdiction over all matters relating to expenditures by the Association and oversees the handling of all Association monies. The Plant Committee, created when the Association acquired Embassy Dairy (Embassy) in 1954, is charged with the supervision of the Association's retail operation and its manufacturing plants. The Executive Committee is a policy body which deals with whatever may be assigned to it by the directors. There are other committees but the three just mentioned are the most important ones. The board holds regularly scheduled monthly meetings, as do the Plant and Finance committees; as a rule they schedule their meetings to be held just before the board meetings. Full minutes are kept of all committee and board meetings. All matters are initially referred to a committee for study. The committees report to the full board with recommendations. In each instance of mismanagement by the directors, as here alleged, this system of study and recommendation was followed. The Secretary-Treasurer-General Manager is the ranking managing officer of the Association. He is directly responsible to the directors for all aspects of the Association's operations and for the performance of all employees. To keep the membership fully informed the Association publishes a monthly newsletter and each year distributes an annual report. Both are sent to all members. Additionally, local meetings are held in each district and an annual membership meeting is held in the spring.

There are three operating divisions. The Fluid Milk Division is concerned with the retail dairy business; the Manufacturing Division produces skimmed milk, cottage cheese, ice cream and powder; the Equipment Division sells farm and dairy equipment to the members.

As the agent of all members in the sale of their milk, it is the Association's purpose to secure the maximum price. The highest price for raw milk is obtained when it is sold for Class I or fluid use, ultimately to be used as table milk or table cream. Sales into Class II or manufacturing use are for the purpose of producing cottage cheese, skim milk powder or other products manufactured from milk. At one time there was a third class, Class III, which was defined as surplus use. Shipping into this category was the least remunerative and least desirable disposition of the members' milk. It was and is the objective of the Association to sell its members' milk into the highest possible class. In actual practice, however, the milk is sold into different ~~classes, for~~ different uses.

At the end of the month each member receives a monthly milk check which represents payment to him for the total number of pounds of milk shipped by him to the Association. The amount each member receives is determined by the percentage of Association milk shipped into each class. For example if 70% of all milk shipped by Association went into Class I, 20% into Class II, and 10% into Class III, each member would have these same percentages applied to his total monthly shipments. In order to finance the Association's operations a brokerage fee of approximately one cent per gallon is deducted from each member's milk check.

At the end of each year the Association computes the net profits derived from its overall operations and issues a patronage dividend to each member in the form of a Revolving Fund Certificate. This represents each member's pro rata interest - based upon the quantity of milk shipped – in unexpended brokerage, net profits from the sale of equipment, and net profits from the general operation of the Association. These certificates are payable to the membership over a period of time which is within the discretion of the board of directors.

The appellants' bill charges the officers and directors of the Association with a series of acts which they say constitutes "waste, illegality, gross negligence, culpable mismanagement in the affairs of the Association and breach of trust and fiduciary duty." We shall now consider the evidence produced in support of the allegations in the bill.

THE FINDINGS OF FACT

The chancellor adopted "the proposed findings presented to the court on behalf of the defendant directors to the fullest extent not inconsistent with" any findings in his oral opinion. Those findings, with only minor editing, we shall now set forth.

THE EMBASSY DAIRY PURCHASE

Early in 1954 James Ward, the owner of Embassy Dairy (Embassy), suggested to Hooper, then assistant-secretary of the Association that the Association should purchase his dairy. Embassy did not purchase milk from Association producers but rather took its fluid milk supply from "Bootleg" and independent producers. As a result available Association milk was being sold for Class III surplus use rather than going into Class I use.

The possibility of purchasing Embassy was an attractive proposal to the management and directors of the Association, since it would eliminate price cutting by Ward and enable the Association to sell its members' milk to Embassy for more than the members would have received if the milk was sold as surplus.

Originally Ward told Hooper that he was asking $7.5 million for the dairy. Hooper said this was an unrealistic figure but nevertheless reported Ward's interest to Mr. Derrick, then general manager and secretary-treasurer of the Association, and the board of directors, who suggested that Hooper should continue to pursue the matter with Ward.

While the negotiations with Ward were continuing, the Association took various steps to determine the most feasible method of financing the contemplated acquisition. The proposal to acquire Embassy was presented to the Baltimore Bank for Cooperatives, a banking institution chartered by the Federal Government for the purpose of making loans to farm cooperative associations. Various officers of the Baltimore Bank for Cooperatives considered the Association's proposal and conducted field visits to the dairy. The Baltimore Bank and the United States Department of Agriculture were informed of the method in which the Association proposed to finance the acquisition of Embassy, the method of pricing the milk sold to Embassy, and the method whereby the Association proposed to repay the loan to the Baltimore Bank for Cooperatives. The United States Department of Agriculture recommended the Association's proposed acquisition to the Bank, and eventually the Bank agreed to commit to lend up to $2,100,000 toward the purchase price.

On April 12, 1954, Hooper turned to the legal aspects of the acquisition and asked Mr. William E. Leahy and Col. William J. Hughes, Jr., the general counsel of the Association, to look into the question whether the purchase of Embassy would be permissible under the antitrust laws of the United States.

Hughes thereupon undertook to comply with Mr. Hooper's request. During the course of their prior representation for the Association, Leahy and Hughes had both had extensive experience with the provisions of the Capper-Volstead Act, 7 U.S.C. § 29, *et seq.* The provisions of this Act immunized farm cooperatives from certain strictures of the antitrust laws, and in considering the question both Hughes and Leahy resolved that, because of the Act's special provisions for farm cooperatives, the acquisition was not objectionable from an antitrust standpoint.

On April 14, 1954, Hughes appeared before the board of directors and, after a full discussion of the legal aspects of the acquisition, advised the board that he and Leahy were of the opinion that the purchase of Embassy would not be a violation of the antitrust laws.

On April 14, 1954, the board of directors acting upon the advise of counsel and management, after appraisal of the property and after a thorough discussion on all aspects of the transaction, authorized the Association to purchase Embassy. It was contemplated by them that the purchase would be financed through the $2 million loan from the Baltimore Bank for Cooperatives, a $500,000 loan from some fifteen participating banks and $1,750,000 which would be raised directly by the members of the Association through their subscribing the Association Certiricates of Indebtedness. These certificates were in fact loans to the Association by its members and were to be interest-bearing, paying 5 percent from the date of issuance. They were to have a minimum maturity date of five years and a maximum redeemable date of twelve years. The purchase was to be almost 100 percent "financed" and provisions were made to secure a rapid curtailment of the debt.

For the purpose of informing the membership on the purchase of Embassy and for soliciting producer subscriptions to the Certificates of Indebtedness "District Meetings" in all producer districts were called by the Association. All members were informed by notice of these meetings. At these meetings directors and management explained in detail the reasons for the purchase, the benefits expected to be derived from the purchase, the price being paid for Embassy, the method of financing the purchase, the method of retiring the indebtedness and the method of pricing the milk which went into Embassy until the indebtedness was retired. The plan received the enthusiastic endorsement of the membership with over 1,000 producers subscribing to Certificates of Indebtedness.

The proposed plan of operation for Embassy if it were acquired by the Association initially took into account that the milk which would be shipped there would otherwise have gone into Class III surplus use at a Sealtest milk plant in Frederick, Maryland. In shipping this milk to Sealtest for Class III surplus use, the Association never received the full Class III price since Sealtest extracted certain handling charges and required the Association to build storage tanks for the milk, at its own expense. The Association was at the mercy of Sealtest when it shipped milk to them at Frederick.

The plan as presented to the membership for the pricing of Association milk which would be shipped to Embassy assured that the producers would receive more than they would have received if their milk had been sold for surplus use. The difference between the increased price which the members received and the Class I price would initially be used to retire the bank indebtedness which arose from the acquisition of Embassy.

Although the profits from the operation of Embassy were to be used to retire the indebtedness, the profit figure was also added as a credit to the members' revolving fund for that particular year. Each member's revolving fund certificate would reflect the netprofits from the Embassy operation which were based upon the price at which the Association sold the milk to Embassy, until such time as the bank indebtedness was completely discharged. At the time of the acquisition of Embassy the members of the Association were fully informed of the appraisals which the board had had made of Embassy the approximately $4 million investment the Association proposed to make in Embassy, the method of pricing the milk to be sold to Embassy, and the profits which would be added to the revolving fund as a result of this price adjustment.

On May 26, 1954, the Association entered into an agreement with Ward for the purchase of Embassy. The terms of this agreement provided that the Association would purchase all assets for $2.5 million; assume a mortgage on Embassy's fixed assets of $440,815.21; and pay to the seller the balance due on all accounts and notes receivable to be determined as of the closing date. The agreement provided for an initial payment of $1 million to be made by July 1, 1954, and the remainder as soon thereafter as practicable but in any event no later than July 31, 1954. If the Association voluntarily defaulted on the July 1 payment, it was to pay Ward $200,000 in liquidated damages.

On June 7, 1954, Hughes received a telephone call from Mr. Ambler Moss, the attorney for Ward. Moss stated that he had received a letter of inquiry from the Antitrust Division of the Department of Justice concerning the proposed purchase and that he had made an appointment for himself and Hughes to meet with lawyers of the Antitrust Division. On June 8 Hughes and Moss went to the Department of Justice and were informed by Mr. Joseph Saunders and other attorneys that the Department had not taken any position on the propriety of the acquisiion; they merely desired information. Hughes and Moss answered questions propounded by the Department's attorneys. Hughes informed them that the agreement had been signed on May 26 and that it called for the initial payment to be made on July 1 and that if the Association voluntarily defaulted they would subject themselves to liquidated damages.

At the June 8 conference it was agreed that the Antitrust Division would send the Association a questionnaire asking for further information. The questionnaire was sent and the answer was delivered in person to Saunders on June 15 at approximately 4 p.m. Hughes also delivered a copy of the May 26 agreement between the Association and Embassy. Saunders again inquired as to what the time element was, and Hughes set forth the provisions requiring the payment of $1 million on July 1 with the liquidated damage clause of $200,000. At this time Saunders informed Hughes that if the Department of Justice found the transaction "objectionable it would get in touch with the Association between now and July 1 and that if [the Association] were not advised between now and then of any objections [it] could assume that there were none." Saunders suggested that Hughes could call around the 24th or 25th of June if he wanted to ease his mind and Hughes agreed to do this. At no time during the discussion was Hughes (or Moss) advised that the Department considered the acquisition to be a violation of the antitrust laws.

On June 25 Hughes telephoned Saunders to "obtain the Department's decision as to the proposed deal." Saunders responded that certain statements which Ward had made in the newspapers prevented the Department's giving him a decision for two or three weeks. Hughes drew to Saunder's attention the provision of the agreement requiring the $1 million payment on July 1, and Saunders indicated he thought the Association should make an effort to extend the date of payment. Hughes indicated he did not think the owners of Embassy would agree to this.

Immediately after the telephone call to the Department on June 25, Hughes consulted with Herbert Bergson, Esq., and Herbert Borkland, Esq., of the firm of Bergson U Borkland. Bergson, the former Assistant Attorney General in charge of the Anti-trust Division, told Hughes that he concurred in general counsel's opinion that the transaction was immunized by the provisions of the Capper-Volstead Act and that the Association would not be violating the antitrust laws if it acquired Embassy.

On June 28, 1954, Hooper, on behalf of the Association, wrote to the Honorable Stanley N. Barnes, the Assistant Attorney General in charge of the Antitrust Division, stating that the Association, under its contract, was obligated to make the $1 million payment but that in view of the Department's interest the Association was making the payment in escrow. This letter was delivered in person by Hughes to Mr. Barnes at the Department. The Association never received a response to this communication.

On July 8 Hughes, Moss and Ward again went to the Department of Justice for a conference on the proposed acquisition. The attorneys from the Department asked more questions, but at no time did they suggest to counsel for the parties to the transaction that the Department considered the acquisition to be a violation of the antitrust laws.

On July 13, 1954, Hughes, along with Messrs. Moss and Ward attended another conference at the Department of Justice. No suggestion was made at this conference that the Department considered the acquisition to be a violation of the antitrust laws. Having heard no objection from the Department of Justice, as they were told they would if the Department considered the transaction in violation of the law, the Association consummated the purchase of Embassy on July 26, 1954, by making the payments provided for in the May 26, 1954 agreement. The Association paid, once accounts receivable were valued, approximately $3,890,000 for Embassy.

In the afternoon of July 26, 1954, Saunders attempted to call Hughes and Leahy were in a conference. Saunders left word. Approximately 1/2 hour later Saunders's secretary called to say that the call was cancelled. The following day, July 27, Hughes called Saunders who stated that [illegible] had cancelled the call when he learned that the transaction had been consummated. Hughes said he would be happy to come down to the Department and fill in the details, and he subsequently received a telephone call that he could do so at 3 p.m. on that day. At this meeting the attorneys for the Department indicated to Hughes that they were "a little surprised" that they had not been advised that the transaction had been consummated. They were reminded by Hughes that the Department was to have advised the Association "if it found anything objectionable and that not having heard from them [he] assumed that nothing was in fact objectionable." Saunders "conceded" that if the Department had found anything wrong, it was to have *advised the Association,* and they proceeded to a further discussion relating to the Ward producers, the Capper-Volstead Act and the operation of retail dairies by cooperatives.

It was not until November 21, 1956, some *two years and four months* after the purchase and on the day suit was filed challenging the propriety of the acquisition, that the Association was first informed that the Department had taken a position on the matter; namely, that the acquisition was a violation of the antitrust laws.

We find in the chancellor's opinion nothing inconsistent with the adopted findings of fact set forth above. Indeed, he further found that the "price paid was a fair and reasonable price"; that counsel relied upon "are most able in the field" of antitrust litigation; that Leahy (now deceased) was "prominent not only locally but nationally ([and he had been] dean of a law school in Washington, an outstanding trial lawyer and one of the most able and respected members of the District of Columbia Bar"; that Hughes's credentials are "most impressive"; that Bergson is a former Assistant Attorney General who had been in charge of the Antitrust Division; that Borkland had had a prominent position in the Antitrust Division. He found also that the directors were fully briefed by counsel; that the decision to acquire Embassy was a business decision and that there was "no basis for the contention that the directors' mistake constituted gross or culpable negligence."

THE ACQUISITION OF RICHFIELD

The second of the "series of acts" arises out of the purchase of the Richfield Dairy Corporation and Simpson Brothers, Inc., trading as Wakefield Model Farms Dairy (Richfield). The findings of facts adopted by the chancellor, with minor editing, follow.

The Association had for a considerable period of time been supplying fluid milk to Richfield. The Association considered these customers to be of great value to the Association since they were purchasing approximately 12,000 gallons a day of its Class I milk. The Association had, however, experienced difficulty in collecting its milk bills since Richfield had been experiencing difficulty meeting its overall financial commitments. As a result the board of directors watched very closely the financial operations of Richfield insofar as they affected its ability to pay the Association, and considered the purchase of Richfield.

Because of the concern over the financial condition of Richfield and the necessity for maintaining the continuing market for Class I milk the board of directors asked the then general counsel, Hughes, and special antitrust counsel, Messrs. Bergson and Borkland to consider the legality of the qcquisition by the Association of Richfield.

On June 13, 1957, Bergson and Borkland submitted their written opinion to the board of directors that the acquisition of Richfield would be unobjectionable from an antitrust standpoint. Counsel commented that "[t]he act of the Association in taking over Richfield is not part of a program of development or expansion; it is primarily a salvage operation designed to prevent a very substantial loss. The fact that the acquisition will furnish additional volume to Embassy in no way detracts from this basic consideration."

In considering the possible purchase of Richfield the board was advised that it had been recently approached by a number of nationally operated dairies such as Foremost, Beatrice Creamery, National Dairies and also local concerns such as Thompsons, Alexandria Dairy Products, Giant Food Stores who had expressed an interest in possibly purchasing Richfield.

Because of the worsening financial condition of Richfield, the increase in the amount of money owed by it to the Association, the Association's desire to protect this debt, and the Association's desire to protect the 12,000-gallon-a-day Class I sales to Richfield, the board of directors on June 14, 1957, after a full discussion of the legal, financial and other aspects of the problem, resolved to purchase the capital stock of Richfield.

At the time of the proposed acquisition of Richfield the Association was already in civil litigation with the Department of Justice over the Embassy acquisition. The board of directors, at all times pertinent to discussion of Richfield, sought to obtain from the Department clearance of the Richfield acquisition. Edgar A. Wren, Esq., the attorney for Richfield, had previously secured a clearance for the sale of Richfield. He requested the Department to "revitalize" this clearance on behalf of the Association. Mr. Joseph Saunders of the Department had, however, advised Wren that because of the pending Association litigation the request had not been considered. Mr. Saunders advised Wren, who in turn advised the Association, that the "parties were free to take whatever action they wish."

On December 6, 1957, the Association purchased the entire capital stock of Richfield for $375,000. At the time of the purchase Richfield was indebted to the Association in the amount of $556,681.93. It was recited in the contract that Richfield was unable to meet any payments on this indebtedness and that the only way the debt could ever possibly be paid would be through the integration of the Richfield operation into the existing Embassy operation of the Association.

In the Annual Report for the year 1957, the membership of the Association was advised as follows:

> "On December 6, 1957, *** Richfield ***[was] acquired and incorporated into the Embassy operations. *** [It was] acquired by the Association in order to protect its own financial interest*** and will be disposed of as real estate."

Subsequent to the acquisition of Richfield its operations were merged into the existing Embassy operation. Approximately $750,000 in fixed assets were acquired in the purchase. The Association sold outright certain land which

Richfield had owned for slightly over $50,000 and also sold Richfield's stock in the Washington Bottle Exchange at a gain of $52,000.

Prior to its acquisition Richfield purchased approximately 80 percent of its milk from the Association. When purchased, its volume was 12,000 gallons per day, which represented sales of $379,000 per months and $5,000,000 per year. To develop a similar capacity at a similar plant in Newport News, Virginia (Marva Maid), the Association expended $2,500,000. The cost to the Association of the capital stock of Richfield was $375,000.

It was always the intention of the board to "write-off" the stock of Richfield once the assets of those dairies were transferred to the books of Embassy. When the assets were transferred, the stock became valueless, but the assets which were then on the books of the Association maintained their value thereafter and were reflected in Embassy statements.

The annual financial report of the Fluid Milk Division (Embassy) for the year ended December 31, 1958, shows a book value of $4,090,447.51. In arriving at this book value, the accountants reflected the "charge-off of accounts and notes receivable of and investment in Richfield $803,544.66." This figure was *deducted* before the accountants arrived at the book value for 1958. The $803,544.66 charge-off was, therefore, reflected in the subsequent computation of the "net gain" on the sale of Embassy since that computation was based on the December 31, 1960 current book value of the Division. The charge-off would not be again deducted in 1960 since it took place in 1958 and was, therefore, already reflected in the 1960 figure. The 1958 charge-off was reported in the financial reports which were published in the Annual report for 1958 and distributed to the membership.

On January 9, 1959, the board approved a Finance Committee resolution to reduce the cost of the Richfield stock from $375,000 to zero, which reflected the transfer of the assets to the books of the Fluid Milk Division.

We do not see, in the chancellor's opinion, anything inconsistent with the adopted findings of fact in respect of Richfield. The chancellor observed that it (the Richfield purchase) "has been assailed by the *** [appellants] as being sheer and gross negligence becaust at that time antitrust proceedings were already pending." He went on to say:

> "We recall, however, an unequivocal communication from Mr. Bergson in the record in this case that in his judgment this acquisition was protected by the Capper-Volsted law. It was on the basis, so far as the legalities are concerened, of his opinion that it went forward, and Judge Holtzoff's decision sustained, the purchase.
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> "As to the business aspects of it, as to the business judgments exercised by the defendant directors, it appears to the court that at the time they made this acquisition, while we may now debate its wisdom, on the basis of the facts as they appeared to them, this cannot be said to be a grossly and culpably negligent decision for them to have made. They made it at a price which was not an unreasonable price. They made it at a time when the customers of that particular dairy represented a substantial segment of the market. To them undoubtedly seemed that this was, especially in the light of the fact that the company was in debt substantially to the Association, that this was conceivably a way of protecting themselves in acquiring not only a dairy and its customers but also its physical properties. This was not an indiscreet or unwise decision. We may quarrel with it now many years after the fact, but the court cannot say as a matter of fact or certainly as a matter of law that the

acquisition of Richfield-Wakefield was a mistake of negligent or grossly negligent proportions."

THE EMBASSY SALE

Next in the "series of acts" complained of is the sale of Embassy. The findings of fact adopted by the chancellor are set forth below, virtually without editing.

On November 21, 1956, the United States Department of Justice filed a civil suit against the Association alleging that the acquisition of Embassy violated §§ 2 and 3 of the Sherman Act and § 7 of the Clayton Act. 15 U.S.C. §§ 2, 3, 18. Judge Alexander Holtzoff of the United States District Court for the District of Columbia dismissed the § 2 Sherman Act charge but after a trial held that the acquisition violated § 3 of the Sherman Act and § 7 of the Clayton Act. 167 F. Supp. 45 (1958); 167 F. Supp. 799 (1958); 168 F. Supp. 880 (1959). The United States filed an appeal in the form of a Jurisdictional Statement in the Supreme Court of the United States, from the District Court's refusal to grant certain requested relief and the dismissal of the § 2 Sherman Act charge. The Association filed a cross-appeal, and the Supreme Court noted probable jurisdiction on both appeals and consolidated the cases for argument and consideration. 60 U.S. 927 (1959). On May 2, 1960, the Supreme Court upheld Judge Holtzoff's findings of antitrust violations and also vacated the judgment on the § 2 Sherman Act question and remanded the case to the District Court for a new trial on that issue.

From the time of the filing of the complaint in the District Court, through the pretrial proceedings, the full trial on the merits, the response to the Government's appeal in the Supreme Court, the filing of a cross-appeal in the Supreme Court, the preparation of briefs, the presentation of oral argument, the subsequent compliance with the Court's order and the continuous conferences with the Department of

Justice, the Association paid Messrs. Bergson & Borkland, special antitrust counsel, $128,224.40 for legal fees, printing of briefs and disbursements for the six-year period covering 1957 to 1962.

On May 3, 1960 the Association immediately wrote to all members informing them of the Supreme Court's decision. Secretary-Treasurer and General Manager Hooper informed the members that "we respectfully differ with the Court but as good citizens we will obey, with good grace, its decision" and sell Embassy as the court had ordered.

At the May 5, 1960 board of directors meeting Messrs. Hughes, Bergson and Borkland explained the Supreme Court's decision to the board. The board considered "the different possibilities of disposing of the Embassy Dairy property" and the board authorized management to "secure an appraisal of Embassy Dairy for guidance in its future disposition." On July 8, 1960, the Plant Committee passed a resolution in the form of a policy directive which instructed management, in disposing of the Embassy operation, to steer away from assurances that the Association would stay out of the retail milk business and not to effect a sale of Embassy which would limit the Association's right to sell its members' milk in any way not prohibited by the orders of the United States District Court. On July 15, 1960, Messrs. Hughes, Bergson and Borkland discussed with the board the policy to be followed in disposing of the assets of the dairy and the board approved the Plant Committee's resolution of July 8 with respect to the policy directive that management should follow in conducting negotiations.

On August 9 Hooper sent a memorandum to counsel setting forth certain questions he wanted answered so as to "guide [him] in the necessary actions in connection with the Embassy Dairy decree." On August 24, 1960 Messrs. Hughes and Borkland answered this memorandum, stating in relevant part that in disposing of the dairy the Association could:

(1) refuse to give a non-compete agreement;

(2) could give a partial non-compete agreement;

(3) that the Association was required to sell Embassy as a "going concern" so as to restore competition as it existed prior to their purchase of Embassy; and

(4) that the Association could, if it wished, acquire land and build its own dairy in the metropolitan area.

On October 10, Marshall and Stevens, Incorporated, independent appraisal engineers, hired by Hooper at the board's direction, submitted to the Association a preliminary report on the fair market value of the fixed assets of Embassy. They advised the Association that the fixed assets carried a value of approximately $3,216,000. This included the Richfield assets which had been put on Embassy's books, but not those the Association had sold and also did not include accounts receivable. On October 24, Marshall and Stevens submitted their final report, and it showed an appraised value of $3,261.000 for fixed assets.

On July 13 J. Ridgley Parks, the manager of Embassy, on behalf of himself and other management employees had written to Mr. Hooper expressing an interest in purchasing the dairy for $2,500.000. This offer was below the price the board and management expected to be able to secure for the assets of the dairy and no other proposal was ever received from this group.

Commencing in the early summer of 1960, numerous businessmen,. attorneys, accountants and other interested parties, many apparently brokers, contacted Hooper and expressed interest in the dairy property. Hooper responded to all inquiries and conducted correspondence and conversations with the interested parties with a view toward further stimulating their interest in the dairy. With the exception of

Mr. Park's offer and two other offers, one made in late October and one in early November, none of the other parties who had expressed an interest in the dairy made any offers to purchase it.

In early October of 1960 Hooper became aware of the interest of Irving D. Berger in purchasing Embassy. Berger was personally known to Hooper as a man of very substantial means in his own right and also was the son-in-law of one Garfield Kass, also a very well-to-do and reputable businessman.

On October 24, 1960 Berger and his attorney, Mr. Oliver McGuire, met with Hooper. Berger advised Hooper that they wished to make an offer to purchase the dairy and conveyed to Hooper an offer which Hooper in turn conveyed to the Plant Committee. On October 28, 1960 the Plant Committee passed a resolution stating that the offer of Berger should be rejected. At the October 28 board meeting, however, after a full discussion of Berger's offer and his interest in the dairy, it was resolved by the board that "Mr. Berger's offer to purchase Embassy Dairy should be accepted in principle with the proviso that the president appoint a committee including Mr. Hooper and Mr. Remsberg as members to negotiate further as to more favorable price and terms if possible and that the committee by empowered to close the deal."

Under the orders of the United States District Court the Association was required to dispose of the dairy by June 20, 1961. Hooper, because of the profits being made from operation of the dairy, wanted to hold on to it as long as possible. Berger, however, had indicated that he considered his offer to be bona fide and in light of the District Court's orders was disposed to report to Judge Holtzoff that the Association was not complying with the Court's orders. Accordingly, negotiations for the sale continued.

Once it became obvious that Berger had a bona fide interest in purchasing the dairy, the Association management and board members undertook independent efforts to evaluate his financial condition and standing. Their investigation showed a very substantial net worth and excellent financial rating. On October 24, Hooper noted in a memorandum that after his conference with Berger he checked with the Riggs National Bank and was advised that Berger had assets of over $20,000.000 and was half-owner of the SEven Corners Shopping Center in Virginia. On October 27, 1960, Mr. Giles Miller, President of the Culpeper National Bank and a member of the board and Plant Committee, received a reply from Mr. James F. Bridges, a vice president of the Riggs National Bank of Washington, to his inquiry on Berger's financial standing. Miller was informed that Berger was a "gentleman of high character and integrity, and he is possessed of considerable means. We regard him as being entirely responsible for his business commitments. *** Because of the size of his net worth, his endorsement on a note would add considerable strength. [W]e are pleased to recommend Mr. Berger to you." Berger was also requested to submit a financial statement, and he did so.

On November 2, Berger appeared with his attorney Mr. McGuire before a Special Committee of the board of directors wherein his original offer and an Association counterproposal were discussed. The Special Committee proposed the submission of a new offer to Berger, and on November 3 Berger responded with a counterproposal which accepted the terms as proposed by the Special Committee on November 2, except for the fact that Berger refused to have his wife, because of her own independent wealth,. also endorse any notes given by his corporation in the transaction. He also assigned different values to different items, but agreed to pay $3,250,000, plus accounts receivable. The terms of sale. as accepted by Berger were $2,355,000 for the physical assets, cash of the business, $150,000 for good will, $745,000 for a five-year non-compete agreement, plus accounts and notes receivable would be paid to the Association.

On November 3 a meeting of the Special Committee of the board charged with responsibility for the sale was held via a telephone conference call to consider Berger's amended proposal. During the course of the negotiations Berger had offered as security to the Association either a lien on the assets of the dairy or his personal endorsement on all notes given in the transaction. The Special Committee determined that, in view of Berger's financial statement and reputation,the assurance which had been given by the Riggs National Bank, and the undesirable location of some Embassy property, the transaction could be best secured through Berger's personal endorsement and guarantee of all notes. The Committee discussed Berger's refusal to have his wife endorse the notes and finally determined to accept Berger's offer, with his endorsement as security, provided that Hooper once again received adequate assurances from Berger's bank references. Acting on these instructions, Hooper contacted Mr. Roland Carr, the senior vice president of Riggs National Bank; Mr. Bridges, the vice president of Riggs National Bank; and Mr. Russell Bolton, treasurer of the National Savings and Trust Company, and in each instance he received adequate assurances as to Berger's ability to pay. Accordingly, Hooper set up procedures for the execution of an agreement. On November 4, 1960, an agreement between Metropolitan Food Corporation, Inc. (Metropolitan) and the Association was signed wherein, subject to the approval of Judge Holtzoff, the dairy was purchased for a price of (once accounts receivable were valued ($4,261,870.70. This price was in excess of the appraised value of the dairy.

The sale to Metropolitan, a corporation headed by Berger, was made on the following terms:

(1) at the time of settlement a cash payment to the Association in an amount equal to the cash in banks and on hand of the dairy;

(2) a single $250,000 non-interest bearing note due six months from date of settlement;

(3) a single non-interest bearing note in an amount equal to the notes and accounts receivable to the dairy due twelve months from the date of settlement (determined to be $773,455.53); and

(4) a single note for $3,000,000 bearing interest at the rate of 5 percent per annum due fifteen years from the date of settlement; interest to be paid semi-annually, principal to be paid semi-annually in twenty-five successive installments of $100,000 each and a final balloon payment of $500,000; the first installment was to become due two years after the date of settlement.

All notes were to be unconditionally endorsed by Irving D. Berger, and the effective date of settlement was to be Janury 1, 1961.

On October 27, Hooper had received a letter from Mr. Bruce PHilipson wherein he expressed interest, on behalf of an unnamed client, in the acquisition of Embassy. On November 2, 1960, Philipson tendered an offer on behalf of his unnamed client in the amount of $4,000,000. It is not known on what date this offer was received by Hooper. At no time during Hooper's contacts with Philipson did Philipson indicate who his client was. Hooper and the entire board considered this a very critical part of the negotiations since the Association was most concerned with insuring that once it sold Embassy it would continue to be able to sell its producers' milk to the purchaser of the dairy. Not knowing who Philipson represented Hooper was not in a position to determine if he could insure that Embassy would continue to purchase its milk from the Association. In reporting to Judge Holtzoff on its efforts at sale the Association had stated that it "refused to negotiate with any broker or agent ***unless such broker or agent would reveal the identity of his principal ***." Berger, on the other hand, had given assurances that if he bought Embassy he would continue to buy from the Association. These assurances were in fact honored and to this day the Association continues to retain this customer.

The agreement between Metropolitan and the Association for the sale of Embassy was approved by Judge Holtzoff. The parties thereafter proceeded to final settlement with an official settlement date of January 1, 1961.

In the January edition of the *Maryland and Virginia Milk Producers News*, a monthly house organ sent to every member of the Association, a report on the "Sale of Embassy Dairy" was made to each member. The first sentence of said report reads as follows: "The sale of Embassy Dairy to the Metropolitan Food Corporation, headed by Mr. Irving D. Berger, a substantial and influential Washington Businessman***." The article continued, "[i]n summary, however, the sale figure for Embassy Dairy would be $3,250,000 plus the exact net amount of accounts receivable, and cash in banks***."

In the 41st annual report of the Association for the year ended December 31, 1960, the secretary-manager reported to the membership that "[a]s you have read in previous issues of The NEWS Embassy was sold to a local business man on January 1, 1961 for the sum of $3,250,000 plus the amount of cash on hand and the value of accounts receival. This resulted in a gain of approximately $450,000 which becomes a part of the Members' Revolving Reserve Fund." He also reported in a separate section dealing with the "Antitrust Case" "That [i]n compliance with the court's order, Embassy Dairy was sold effective January 1, 1961, to Mr. Irving D. Berger, a Washington businessman. Further information on the sale of Embassy has been included in other parts of your Annual Report."

During the period of Association ownership of Embassy $5,173,892.12 in profit was realized from the Embassy operation. As a result of the sale to Berger $465,794.41 in net gains was also realized by the Association:

The chancellor's opinion contains nothing inconsistent with the findings of fact set forth above. The following excerpts from his opinion indicate that he made additional findings:

> "Parenthetically, we do not agree that this was a fruitless appeal. Monies had to be expended, of course, in counsel fees, but these eminent counsel recommended to the Association's directors that this Association had more than a 50-50 chance. As a matter of fact, we recall in the communications of the manager that they had a better than 90 percent chance of reversing Judge Holtzoff.
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> "This is not a situation where inexperienced counsel are making irresponsible recommendations to a client, but eminent counsel are making it on the basis of the record then made. It seems to the court that the appeal was properly pursued."
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> * * * * *
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> "When we read the bill of complaint and the Court of Appeals opinion in this case, [we] had no idea who Mr. Berger was. In the trial in this action we have heard and have had him identified as a man of very substantial means livng and doing business in the District of Columbia, receiving the highest recommendation of the Riggs National Bank of Washington, D.C., one of the most responsible financial institutions in the area, if not the country, a recommendation made to Mr. Hooper, made to Mr. Miller, who himself was a banker and who is a correspondent of the Riggs National Bank. We have information here with respect to this man's assets aggregating $20 million, and we know from the testimony in this case that he is related to a family of wealth, the son-in-law of Mr. Garfield Kass, and

together with Mr. Kass having developed the Seven Corners Shopping Center, a very substantial commercial enterprise in nearby Virginia.

"So it must be said that, with respect to this man, his signature was indeed better than a lien on the property, and we so find in this case.

"It may well have been that the directors should have obtained not only his signature as an endorser, but, also, a lien on the property. That was not the option available by the purchaser. It wasn't made available to the directors. They had their option and they chose to get his signature and, as the record shows, they protected themselves with respect to a waiver of the wife's dower interest."[4]

THE $500,000 DISCOUNT ALLOWED ON THE NOTES ENDORSED BY BERGER

The fourth in the "series of acts" claimed to be "culpable mismanagement in the affairs of the Association" is the discount allowed to Eastern Food Products, Inc. (Eastern), the successor to Metropolitan, in consideration of the prepayment in full of the notes endorsed by Berger. The findings of fact adopted by the chancellor are set forth below.

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[4] Evelyn K. Berger, wife of Irving D. Berger, "waive[d], release[d] and relinquish[ed] all right, title and interest***[acquired or to be acquired] by stature or otherwise *** solely by reason *** [of her marriage to Berger] as may be necessary to meet [Berger's] obligations on the "notes given by Metropolitan Food Corporation to the Association.

Shortly prior to August 12,1963, Hooper learned through newspaper articles in the Washington papers that Berger had made provisions for the sale of the assets of Embassy to the Southland Corporation of Dallas, Texas.

On August 12, 1963, Hooper wrote to Berger stating that the Association was concerned and interested in knowing how this transaction was going to affect the $2.8 million note which was still due the Association from the sale of Embassy to his interests. Hooper received a prompt reply from Mr. Oliver McGuire, Berger's attorney, stating that the interests of the Association "have not been jeopardized," and that "Mr. Berger and Eastern Food Products, Inc. are able to and, in my opinion, will meet their respective obligations to the Association when due."

Hooper brought this matter to the immediate attention of Mr. J. Homer Remsberg, the Association president, who told him he too was concerned.

On August 15, 1963, a conference took place between Hooper, Berger and McGuire. The parties concerned themselves with the sale of the Embassy assets to the Southland Corporation and the Association's rights under the note it held. Berger advised Hooper that Eastern had never defaulted on any payments to the Association and that the Association could continue to expect all payments to be made in full when they became due. Berger further stated that he was under no legal obligation to anticipate payments and intended to meet them in accordance with the terms of the note.

At this conference, or at another earlier conference between the parties, Berger suggested to Hooper that had he been willing to consider an early payment of the note he would require a $1,000,000 discount for so doing. Hooper flatly rejected such a proposal. On August 19, Edward L. Merrigan, the then general counsel of the Association, wrote to McGuire requesting full details of the transaction and further information as to how the Association's interests had been protected. Onthe same date McGuire responded to Merrigan's letter setting forth the details of the transaction, which required the final payment of monies to Eastern by October 1, 1963. He further stated that the Association could expect to retain Embassy as a Class I fluid milk customer and that Eastern could now either discharge the note to the Association or make the payments when they became due. McGuire pointed out to Merrigan that the Association still possessed Berger's guarantee of the note and that when the Association took this note its "only real security was the integrity, responsibility and ability of Mr. Berger, and the situation remains unchanged."

On September 3, Merrigan again wrote to McGuire asking that arrangements be made at the earliest date to discharge the $2.8 million note "in whole or substantial part, out of the cash proceeds of sale of the assets which your client acquired from the Association." McGuire responded on September 5 that his clients had no legal obligations to discharge the note until payments became due, but that they would be willing to consider any proposal along the lines of anticipating the note which the Associationwould care to make. McGuire also pointed out that a very "substantial discount would be required to induce his clients to discharge the note" because "cash in hand is worth substantially more than cash deferred over a period of twelve years, considering comparative interest rates and the inflationary processes at work." On September 6 Berger himself wrote Remsberg, concerning the fact that he would be willing to anticipate the note for a substantial discount but also warning the Association that he was under no legal obligation to prepay a note which was not in default and that if the Association attempted to bring pressure to bear on him through institution of legal proceedings that such a suit would be unsuccessful and he would take appropriate counter-action if any damage were done to his credit or standing in the community.

General counsel Merrigan gave full consideration to the Association's legal position on this matter. He was of the opinion, and so advised the board, that the maintenance of a suit against Eastern as the maker and/or Berger as the guarantor, would have little chance of success. In arriving at this determination, he considered the fact that:

(1) all payments under the existing note (and prior existing notes) had been met when due and owing;

(2) at the time of the sale of the assets to Southland, the note was not in default and the next payment was not due until January 1, 1964;

(3) there was no evidence to indicate that either Eastern or Berger personally were not in sound financial positions so as to enable them to continue to meet their obligations, indeed the evidence was to the contrary;

(4) the Bulk Sales Act afforded the Association no remedy against Eastern or Berger which would in any way enable the Association to secure prepayment of the note.

With respect to the Bulk Sales Act, the Association had received notice of the sale prior to August 12, when Hooper wrote to Berger's attorneys. McGuire had also informed Merrigan that final payment would not be made until October 1, 1963, at which time the transaction would be closed.

The Bulk Sales Act then in effect, 28 D. C. Code § 1701 et seq. (1961 ed.), did not give the Association a remedy against Eastern or Berger on the note. This act only allowed a transaction to be set aside for failure to notify third party creditors of the sale. It did not give to creditors a right of prepayment of existing debt and the Association had in fact received notice of the proposed sale. More importantly, Embassy was currently purchasing 7 million dollars worth of milk per year from the Association and this volume could be lost through the filing of a specious claim.

On September 13, Merrigan appeared before the Finance Committee of the board and discussed all problems raised by Eastern's sale of Embassy to Southland. After discussion of the matter the Finance Committee passed a resolution authorizing Merrigan to enter into negotiations for the purpose of attempting to prevent any dissipation of the funds which were now available to Eastern and to take such legal action, with the prior approval of the president, which he thought might be proper or necessary to prevent the dissipation of these funds. Merrigan also appeared before the full board of directors on this same day and discussed with the board the problems arising from the sale by Eastern. The resolution passed by the Finance Committee was approved by the board of directors.

Thereafter, a series of meetings and correspondence transpired among Berger, McGuire, Merrigan and Remsberg wherein the parties exchanged various proposals and counterproposals respecting the parties' legal rights and the amount of discount which would be given if Berger agreed to cause Eastern to prepay the existing $2.8 million note. At this time all payments on the note had been met and it had been reduced from $3,000,000 to $2,800,000. Berger's final offer to the Association was a discount of $500,000 for immediate payment of the note,

Merrigan advised the Board that a suit against Berger could have disastrous consequences since at the time the Association was selling Embassy approximately $7 million worth of milk per year. To have risked the loss of this customer by filing a tenuous suit without the possibility of securing the payment of the note was, in the opinion of general counsel, and he so advised the board of directors, an unwise step to take. He also advised the board that any action against the financial standing or credit of Berger, a man of the highest financial respect in the Washington community, could expose the Association to a very serious countersuit unless the action was successful. In his opinion, the Association had no legal rights to secure prepayment of the note and he so advised the board.

At a Finance Committee meeting and the subsequent board of directors meeting on October 10, 1963, the directors considered the matter of Berger's final offer of $500,000. Merrigan advised them that this was Berger's last offer and would involve the immediate payment of $2.3 million plus interest instead of the eventual payment over a 12-year period of $2.8 million plus interest. Merrigan noted that the note was not in default and informed the board that in his opinion as general counsel Mr. Berger was under no legal obligation to prepay the note. He also informed the board that he had discussed the matter with his brother, a bank president in New Orleans. After full consideration he advised the board that in his opinion the immediate payment of $2.3 million would be of substantial benefit to the Association.

Giles Miller, Upton Gladhill, Edward Norman and J. Homer Remsberg testified that they computed, arithmetically, the value of $2.3 million immediately as compared to $2.8 million paid over twelve years. They also testified that the board considered the fact that the Association was preparing to borrow money for construction of a new plant in Newport News, Virginia, and also in connection with payments on the 1957 Revolving Fund Certificates. They testified immediate cash payment by Berger would obviate the necessity of borrowing this money and the directors took this into consideration during their discussion.

After a full discussion of the entire transaction and taking into consideration the opinion of general counsel and those members of the board who had particular banking expertise, namely Messrs. Miller, Gladhill and Norman who were all bank officers or directors, the board voted to accept $2.3 million in full settlement of the outstanding debt of Eastern of $2.8 million to the Association.

On October 14, 1963, the Association accepted the payment of $2.3 million, plus interest, in full discharge of the outstanding indebtedness of Eastern to the Association.

The payment and discount was reflected on the Association's books and was reported by the auditors, Wayne Kendrick & Co., in the Association's financial statement for the year ended December 31, 1963 as "discount allowed on prepayment of Eastern Food Products, Inc. note–$500,000," which financial statement was published in the 44th Annual Report for the year ended December 31st, 1963.

For the purpose of informing the membership Merrigan prepared an 18-page statement dealing not only with the discount but the entire Embassy matter from the Association's purchase of it in 1954 through the discount on the note. This statement was presented to the membership, along with the Dugan Investigation Report, at district meetings in the spring of 1964.

The chancellor, in his opinion, took notice of the fact that Berger, at the time, had in his possession "millions of dollars in cash as a result of the sale" of Embassy to Southland. He said "the situation was disturbing [to the directors of the Association] even though Berger was a man of great wealth and reputation" but, he added, "Berger was plainly anxious to avoid the possibility of a suit clearly suggested by Merrigan." As he expressed it "should they wait out the period of time for the payment of the notes [absent a lien on Embassy's assets] *** or press for some other solution?" He went on to say:

> "Among the circumstances they considered were the facts that they were faced with the necessity for substantial borrowings that year and the next year in connection with the revolving fund certificates, and something in the area of $1 million that year in connection with Marva-Maid and other operations; and on the basis of their best business judgment they considered that getting substantially paid then was much better than waiting for the period of time to which we have referred."

THE HARRISON DAIRY PRODUCTS ACQUISITION, THE DUGAN INVESTIGATION, THE HOOPER AND ROBBINSON SETTLEMENTS, AND DISCLOSURE TO THE MEMBERSHIP

The final items in the "series of acts" said by the appellants to constitute fraud and culpable mismanagement will be treated under this heading since there is something of an overlap in this regard. The findings of fact adopted by the chancellor, with some editing, are set forth below.

In the spring of 1961 Hooper discussed with several members of the board the possibility of the Association selling its milk products on the Florida market. One of the Association's largest customers in the Florida market, Galloway West, had recently entered into an arrangement to purchase its supply from the Borden Company, and Hooper was anxious to continue to sell Association products in Florida. Hooper learned that the Florida Milk Commission would not, however, issue a permanent permit to an out-of-state cooperative. They would only issue individual shipment permits.

J. Homer Remsberg, the then president of the Association, had a conversation with Hughes, the Association's general counsel, in the spring of 1961 "regarding *** selling products in Florida." This conversation was "not on the subject" of Hooper and Robinson setting up a private corporation but rather dealt with the inability of the Association to get a permit for the Florida market. Hughes was told by Remsberg to look after the Association's interests.

In late July of 1961 Remsberg found an undated letter on his desk from Hooper in which Hooper sought to review with him "the organization of the distributing corporation *** Robinson and I have set up to handle Association products as well as some local products in

Jacksonville, Florida." The statements and representations in the letter were subsequently joined in by Arthur V. Robinson, who also signed the letter.

The letter stated that Robinson, Hooper and members of their families were the beneficial owners of the capital stock of this distributing corporation. Hooper stated in the letter that it was his intention to be on record so that if the Association felt the maintenance by them of the corporation was not in the best interests of the Association at whatever the fair market value might be. Robinson agreed with these representations.

Although Remsberg recalled discussion of the Florida market prior to receipt of the undated letter, he never had a discussion with Hooper or Robinson, wherein he was advised by either that they were setting up a personal corporation in Florida. Remsberg had never approved of such a corporation, and the board had never authorized one.

After receiving the undated letter, Remsberg called Hooper into his office for a conference. He informed him that his and Robinson's ownership of Harrison Dairy Products (Harrison) was, in his opinion, a "pure conflict of interest" and that as president of the Association he would have to "take it [the ownership matter] to the board" and that in his opinion it "cannot be."

On August 7, 1961, Remsberg received an eight-page letter from Hooper, which also dealt with Hooper's and Robinson's ownership of Harrison in Jacksonville, the distributing corporation he had referred to in the prior letter.

The first member of the board of directors with whom Remsberg discussed Hooper's revelations on Harrison was F. Upton Gladhill. The discussion took place sometime in late July along the side of the road near Gladhill's pea field. Remsberg explained to Gladhill what he had come to learn about the ownership of Harrison, and Gladhill informed Remsberg that he too thought the matter should be brought to the attention of the members of the board at the next meeting.

At the Plant Committee meeting on August 10, 1961, an executive session was held wherein Remsberg brought the members of the Plant Committee up to date on what he had learned about Hooper's and Robinson's ownership of Harrison. The matter was further discussed at subsequent board meetings and a decision was made by the directors that the situation could not conitnue as it was and that the possible purchase of Harrison should be explored.

Subsequent to the disclosure of Hooper's and Robinson's interests in Harrison, Hooper advised Remsberg that he was scheduled to appear before the Florida Milk Commission. The appearance, he suggested, could only be made in his capacity as an officer of a Florida corporation, and he also deemed it in the Association's interest for him to do so. Conversations with Robinson on the possible purchase also took place.

At the board of directors meeting of January 12, 1962, the board passed a resolution authorizing the Executive Committee to go to Jacksonville, Florida, to make a first-hand inspection of the Harrison operation. On February 1, 1962, the Executive Committee met at the Harrison plant in Florida for the purpose of inspecting the facilities. What they saw was a "going dairy concern." It was a small plant, well kept, with an inventory of powdered and sterile milk, and several employees were present and working. The overall impression was one of substantial activity at the facility.

On February 9, 1962, the Executive Committee recommended to the board that the Association purchase Harrison. On the same day the board approved the Executive Committee resolution. In approving the purchase of Harrison, on terms to subsequently be determined, the board of directors took into account the personal inspection trip by members of the Executive Committee and their report that the operation was a "going concern." They also considered the elimination of the conflict-of-interest situation, which they believed the operation of Harrison presented. The board was also aware of the potential Florida market for Association products which Harrison was apparently serving.

Remsberg requested Edward L. Merrigan, an attorney who had been doing work for the Association, to represent the Association in drawing up the final papers for the sale of Harrison. Remsberg took this step to insure protection of the Association's interest since Hughes, the then general counsel, had been involved in the initial chartering of Harrison.

Remsberg gave Merrigan a copy of a proposed agreement between the parties, which set forth the terms at which the Association would purchase Harrison and also a document entitled, "Basis for Sale of Harrison Dairy Products," which indicated that the figure would be approximately $89,000.

In order to compute the exact purchase price, Merrigan sent to Ernest Clifford of Wayne Kendrick & Co. on March 27, 1962 a copy of the agreement between the parties along with the "Basis for Sale" document which he had been given by Remsberg. Clifford was requested to compute the actual purchase price per the agreement and to prepare a statement showing his commitments.

On April 9, 1962, Wayne Kendrick & Co. submitted a report to Merrigan computing the value of the Harrison stock as per the proposed agreement of purchase. This figure was $81,341.27 as shown by the computation in Exhibit A of Kendrick's report.

Remsberg and Merrigan discussed the Wayne Kendrick statement prior to the actual consummation of the purchase on April 12, 1962. Remsberg was aware of the fact that the business of Harrison was "primarily the sale of merchandise purchased from [the] Association," and also that the book value of Harrison stock, one of the factors to be considered, was $33,641.72. Book value, however, was not determinative in Remsberg's mind of "actual value" and the board was interested in buying a "going concern" which had a license to operate in Florida. Remsberg was aware of the fact that the actual figure at which Harrison was purchased was approximately $8,000 less than the proposed figure which had been submitted to Kendrick.

In deciding to purchase Harrison, the board of directors relied upon: (a) the recommendation of their Executive Committee, which had inspected the property; (b) they considered the computation of the approximate purchase price as computed at $89,000; (c) their opinion that the price represented fair market value; (d) their belief that they were purchasing a going concern which was profitable and active in the Florida market; and (e) their desire to eliminate what they considered to be a conflict of interest.

At the time of the Association purchase of Harrison on April 12, 1962, no director of the Association was aware of the fact that large portions of Harrison's sales were to previous customers of the Association or that actual delivery of products, the sales of which were credited to the books of Harrison, were being made directly from the Laurel, Maryland, plant. Furthermore, there were no documents in the Association's files which reflected the above.

Subsequent to the acquisition of Harrison, the Association's records reflected substantial sales and profits from the plant's operation for the last nine months of 1962.

Sometime during the latter part of 1961 Remsberg, and other members of the board, became aware that Robinson and his partner, Berman, through a corporation known as Mutual Milk Sales, Inc., were involved in constructing a milk processing plant in Oneida, New York, for a federation of New York co-operatives. The fact of Robinson's participation in the construction of the plant was reported in several trade journals, and Hooper was aware of Robinson's making weekend trips to Oneida. The members of the board were, however, unaware of the fact that Robinson was involved in the actual management of this plant when it became operative in the spring of 1962.

Mr. Hooper and members of the Plant Committee were aware of the fact that sales of powder manufactured at Laurel were often made at prices less than the government support price. This matter had been discussed among Hooper, Robinson, Click (identified *infra*) and members of the Plant Committee; and while the parties differed on the actual amount, they were in agreement that sales to the government could actually result in the Association's receiving between 2 and 3 cents less per pound than the actual price paid by the government. This resulted from several factors:

(a) within a period of one year from the time of sale, the government could reject for impurity any of the powder which it had purchase;

(b) if powder was rejected, the cost of removing it from the warehouse was borne by the seller;

(c) sales to the government required multiple inspections and resulted in delay in removing the powder from the Association's limited storage facilities at Laurel;

(d) it took the government between ninety and one hundred and twenty days to make payment to the Association;

(e) special bags were required for packing the government powder;

(f) the Association had to pay the government's inspection costs; and

(g) if one bug was found in a shipment, the government prohibited resale for human consumption, and the powder could then only be sold far below the government price for use as animal feed.

During the course of 1962, sales from Laurel below the government support price were made to Mutual Milk Sales Packaging Division, Inc. It was not until February of 1964, however, when Dean Dugan rendered his report to the Association that any member of the board of directors became aware that Arthur Robinson was a co-owner of Mutual Milk Sales Packaging Division, Inc.

The operation of the Laurel plant was profitable to the Association. While labor costs and market conditions affected profit margins, the plant was exceptionally successful and earned over $4,000,000 between 1958 and 1963. The plant at Oneida was not in direct competition with Laurel as it could not produce the same high grade powder, "Grade A," which Laurel did and it served a different milk shed area. In some instances, Laurel and Oneida even cooperated to the benefit of Laurel in handling shipments of "Extra Grade," a lower grade powder which Laurel also produced, which Laurel alone could not fill.

On November 8, 1963, James E. Click, the assistant general manager and assistant treasurer of the Association, submitted his resignation to the board of directors. At this same meeting, Click leveled a series of charges against Hooper and Robinson which alleged impropriety and conflict of interest in the performance of their official duties for the Association. Click had, in July of 1962, previously submitted a memorandum to Hooper which set forth certain rumors which had come to his attention. At the time of his resignation in November of 1963, Click attempted to substantiate some of the earlier charges and included in his charges every rumor which had come to his attention in the interim.

The board of directors refused to accept Click's resignation on November 8, 1963 but instead voted to authorize a full investigation of the Association's affairs, past and present.

The Plant Committee was given the responsibility for seeing that an independent, thorough and full investigation was made. Merrigan, the then general counsel, submitted the names of three individuals to the Plant Committee, all, in his opinion, qualified to conduct the investigation. The Plant Committee chose Dean Frank Dugan of the Georgetown University Law Center, a nationally renowned fact-finder, to conduct the fact-finding mission. It also hired Wayne Kendrick, the Association's auditor, to personally assist Dean Dugan in his investigation.

Dean Dugan as a condition of accepting the responsibility for the investigation insisted that his report be covered by the attorney-client privilege and be confidential because of the unique nature of the investigation.

Using as a basis for his investigating the charges leveled by Click, Dean Dugan called nineteen witnesses before him, all of whom appeared freely, voluntarily and without counsel.

On January 30, 1964, Messrs. Merrigan, Dugan and Remsberg were advised by Robert M. Goldman, Esq., that he represented Robinson. On January 29, 1964, Hooper advised Dean Dugan that he had retained James T. Reilly, Esq., as his attorney.

At a Plant Committee meeting on February 12, 1964, Dean Dugan read and explained his report. On the same day Dean Dugan again read and explained his report to the entire board of directors. At this same meeting, Wayne Kendrick discussed two confidential reports which he had prepared in the course of Dean Dugan's investigation. One of these reports showed that Harrison, during the period of its ownership by Hooper and Robinson, had made a gross profit of $135,529.67 from sales to former customers of the Association or new customers whose purchases had been shipped directly from the Association's Laurel plant. The other report showed that Mutual Milk Sales Packaging Division, Inc., had made gross profits of $100,256.23 from the resale to Weldon Farms Products, Inc., of milk powder which it had purchased from Laurel, but which had been shipped directly to Weldon from the Laurel plant.

In the course of his investigation for Dean Dugan, Kendrick was able to conduct a complete study of the Harrison books and records. With respect to Mutual Milk Sales Packaging Division, Inc., Kendrick examined each sale on the Association's books and also Mutual Milk Sales Packaging Division, Inc.'s sales records which showed the other side of eaach transaction. The latter documents were made available to Kendrick by Robinson at Merrigan's request. Kendrick was also able to determine the gross profits which Mutual Packaging made on these sales by virtue of a certificate from Robinson's accountants. No other sales of dairy products were made by the Association to any corporation with which Robinson had any connection.

On February 12, 1964, as a result of the revelations in the Dugan Report, the board of directors requested Hooper to resign. Hooper refused to do so, and he was immediately terminated by the Association. Robinson's contract had not been renewed, and it expired on December 31, 1963.

In his report to the board, Dean Dugan suggested that certain matters which he had not had time to follow up should be considered by the Association. One document in his possession indicated Hooper had a connection to Marshall

Properties, Inc. Click had also questioned the relationship, if any, of Red-73 to the Laurel plant. Dugan recommended that an investigation of the latter be made. Subsequently Merrigan wrote Click, who had been made acting secretary-treasurer and general manager, and as a result, Click requested Messrs. Snyder, Marshall and others on the Association's staff to continue to investigate the above matters and also any matters which might involve claims against Hooper and Robinson. Among the latter were an allegation of improper use of an airplane which had been rented by the Association from Hinson Aviation Company, an entity in which Robinson had an interest, and the alleged purchase of certain assets from Mutual Milk SAles. Merrigan was advised by Click that he was satisfied that there was no additional information which substantiated any charges of impropriety in connection with these allegations.

The board of directors, after receipt of the Dugan Report, had authorized Merrigan and Dean Dugan to take steps to recover for the Association monies due from Hooper and Robinson. On or about February 25, 1964, Merrigan, at a conference in his office, presented the Association's demands. Mr. Reilly asserted claims against the Association on behalf of hooper in the amount of $112,000 plus unliquidated claims and punitive damages. Merrigan threatened to bring action under the Association's crime bond and counsel for the other side responded by asserting their own claims against the Association.

Merrigan and Dean Dugan examined the prospects of litigating the claims against Hooper and Robinson. They came to the conclusion that it would most probably be necessary to institute numerous and separate proceedings in different jurisdictions if litigation were resorted to. They also considered the fact that the claims of Hooper were not without merit. They also considered the litigation expense which would be involved and the uncertainty of the eventual result.

After a thorough study of the posture of all parties to these negotiations and the merits of the respective claims, Dean Dugan and Merrigan recommended in a detailed written report to the board of directors that they authorize a settlement with Hooper and Robinson.

At a board of directors meeting on March 13, 1964, the reasons for and the details of the settlement recommended by Dugan and Merrigan were presented. A copy of Dugan and Merrigan's letter was given to each director, and the recommendations contained therein were explained and discussed among the board and counsel. Counsel were informed that the board wished to extract the maximum amount of money from Hooper and Robinson and to pay as little as possible to satisfy Hooper's demands. Dugan and Merrigan explained to the board their opinion that it would be necessary to institute multiple legal proceedings in different jurisdictions if the Association decided to litigate the matter. They also said that they could not guarantee success in these proceedings and pointed out the cost to the Association of maintaining several lawsuits. It was their recommendation to the board of directors that the settlement as outlined in their letter be entered into since, in their opinion, it insured the Association a substantial recovery, avoided the costs of litigation and would allow the Association to put its own house in order and proceed with the business of selling the members' milk. It was the opinion of counsel that the settlement as outlined in their letter of March 10, 1964, was in the best interests of the Association.

After a thorough discussion of all aspects of the release transaction and in reliance upon the recommendation of Dugan and Merrigan, the board of directors authorized counsel to enter into mutual releases between the parties.

During the period of time after the board had authorized counsel to consummate releases with Hooper and Robinson, Merrigan sought assurances from Click and other members of the board that all pending matters between parties had been fully explored to the satisfaction of the Association. Merrigan received assurances from Click that the matters which Dean Dugan had requested be given further attention had, in fact, been looked into by the Association and found to not involve a possible cause of action in favor of the Association against Hooper or Robinson. This investigation was conducted prior to the time the releases were entered into.

Merrigan continued to keep members of the board informed of his investigations and negotiations up until the actual consummation of the releases.

On April 1, 1964, the Association executed mutual general releases with Hooper and Robinson. As consideration, the Association received:

(a) a check from Robinson for $95,686.65;

(b) a credit on salary due Robinson under his 1963 contract in the amount of $38,527.28;

(c) a credit on the unpaid balance due for the stock of Harrison in the amount of $19,700.07;

(d) checks from Hooper in the amounts of $818.69 and $254.51 for miscellaneous accounts;

(e) release by Hooper of approximately $46,000 in liquidated and other unliquidated claims against the Association;

(f) the release of the Association from claims of Robinson, his family, Mutual Milk Sales, Inc., Mutual Sales Packaging Division,Inc., and Olney Acres Dairy Products; and

(g) indemnity of the Association for possible claims against it by the minor children of Hooper and Robinson.

The releases by the Association of April 1, 1964 were the result of Substantial research and consideration on the part of Merrigan, Dugan, Association employees and the board of directors; the setting forth of all claims by the respective parties; continuing investigation by the Association; arms-length negotiations among the attorneys for the parties; the opinion of general and special counsel that the releases were in the best interest of the Association; and the decision of the board, in reliance on counsel's condition that the Association's interests could best be protected through execution of general releases.

Subsequent to the execution of the releases with Hooper and Robinson, Dean Dugan continued his investigation, focusing on charges which had been made against Click by Hooper and M. Belmont Ver Standig, the Association's public relations advisor. The board determined that the entire matter could only be fully brought to rest after these charges had been explored.

Merrigan attempted to arrange for Hooper to testify but was informed by Hooper's attorney, Mr. Reilly; that Hooper would only testify if the Association would grant him the right of indemnification for any damages he might experience as a result of his testimony. Merrigan refused to do this. Dean Dugan attempted on several occasions to arrange for Belmont Ver Standig to testify but Ver Standig was ill. Ver Standig was contacted at his place of recuperation and finally stated he would not appear to testify.

Dean Dugan drew to the attention of the board the efforts which had been made to secure testimony from Hooper and Ver Standig. On May 8, 1964, the board voted to conclude the investigation into the affairs of the Association since it was obvious that the testimony of neither of these individuals could be secured. It was stipulated by all parties that there was no merit to the allegations made against Click.

During the course of Dean Dugan's report to the board, he had mentioned the entity, Marshall Properties, Inc. Marshall Properties, Inc. was a corporation used by Robinson and his partner, Berman, to acquire land in Laurel, Maryland. They did not wish it known that they were acquiring the property and, as a result, asked Hooper if they might use his name as president. Hooper allowed them to do so. Hooper performed no services for the corporation, received no money from the corporation, and the corporation had no business whatsoever with the Association.

During the course of his report to the board Dean Dugan mentioned the entity, Red-73, and suggested that its relationship, if any, to the Association be looked into. Red-73 was a manufacturing plant somewhere in Indiana or Ohio, which was owned by C.Y. Stephens, the owner of High's Dairy. Robinson purchased the stock of Red-73 for the purpose of liquidating the corporation. Robinson did not operate it as a dairy or manufacturing plant but rather sold off its assets. There was no connection between the Association and Red-73. Click mentioned Red-73 to Dean Dugan as an unsubstantiated rumor and without knowledge of the true nature of its operation or Robinson's relationship to it.

As a result of sales made by the Association to High's Dairies, the estate of C.Y. Stephens and corporations owned by him owed the Association approximately $275,000. All of these funds were fully paid with interest.

Subsequent to the settlement of April 1, 1964, with Hooper and Robinson, the Association filed a claim for federal income taxes which had been paid during the period of time that Hooper and Robinson owned Harrison. This claim was subsequently settled when the Association recovered $25,000 of the approximately $50.000 which Harrison had paid in taxes. A similar claim was filed with respect to the sales to Mutual Milk Sales Packaging Division, Inc., which is still pending. [Its present status is unknown to this Court.]

At the board of directors meeting of February 14, 1964, Wayne Kendrick presented his Annual Report on the operations of the Association. At this time the investigation into the affairs at the Laurel manufacturing plant was still continuing, and a determination had not been made as to whether there were any additional claims against Hooper and Robinson arising out of the Laurel operation. In order to adequately reflect that the investigation was still continuing and to indicate that a resolution of the matter had not yet taken place, the board authorized Merrigan and Kendrick to draw up an appropriate comment, which would indicate that the Laurel operation was still under investigation.

To reflect the above Merrigan and Wayne Kendrick agreed to include the following comment in the financial report for 1963, which would be published in the annual report for that year:

> A review of sales, prices and procedures at the Manufacturing Division has been initiated but determinations and adjustments, if any, were not completed at the date of this report.

At the annual meeting on February 22, 1964, there was a general discussion of the investigation which was being made into the affairs of the Association. Because of the presence of press at the meeting and the confidential nature of the Dugan and Kendrick reports, the directors of the Association resolved that the membership should be fully informed of all aspects of the investigation at district meetings, which would be held in the spring of 1964. It was resolved that a report on the discount of the Embassy Dairy note would also be made at these meetings.

In the spring of 1964 Merrigan prepared a 43-page summary of the Dugan Report and an 18-page summary of the *entire* Embassy transaction. These reports were read to the membership at the district meetings; in some instances, by the director from the particular district and in other instances by Merrigan himself. A full discussion of the matters contained in the reports took place at these meetings.

In respect of the Harrison purchase the chancellor had this to say:

> "The evidence shows here clearly, unequivocally recognized, of course, by the Association directors then, by everyone now, a clear conflict of interest in the acquisition by Mr. Hooper and Mr. Robinson of the plant in Florida and the incorporation of it under the name of Harrison Dairy. This was a conflict of interest which was brought to the attention of Mr. Remsberg in August of 1961.
>
> "We think it important to point out the outset of this episode that at that time the directors were not aware of the transactions with reference to 'phantom brokerage' through the use of this corporate entity which came to light during the Dugan investigation in late 1963 and 1964. At this particular time Mr. Homer Remsberg, the then president, considered that there was indeed, when it was brought to his attention, a conflict of interest and he remarked, 'This cannot be.'
>
> "It has been urged upon the court that certain actions should have been taken much sooner than they were. The record does show in this case that Mr. Remsberg, after talking with Mr. Gladhill of this county [Montgomery], whom he referred to as 'one of our most responsible directors,' then took it up at the next meeting of the board of directors. It was determined that something should be done immediately. And the record shows the appointment

> of a committee including at least two members of the Executive Committee to make a trip to Florida to examine the Harrison facilities.
>
> "The Plant Committee had a meeting down there in Florida and their minutes are in the record. There was thereafter a meeting of the board of directors in Arlington, at which time the question of acquisition of Harrison was considered."

Commenting on the Click charges the chancellor found "that the board acted very responsibly at that time in the face of a festering problem in the corporate family ***." He continued:

> "What they did at that juncture—and how it was done—was critical to the future of the Association. They chose at that time to have a confidential fact-finding investigation by Professor Dugan of Georgetown University Law School, a person described in this record as one of the most renowned men in the country in that specialty, certainly a man of great eminence and integrity.
>
> "The evidence in this case shows abundantly that there was complete cooperation between Professor Dugan and the defendant directors, that they gave him carte blanche, the only restriction being that he was not to interview a competitor; the Association would make all of the books and records available, all directors would be made available.
>
> "Mr. Robinson did appear more than once, we recall three times, and without counsel. Mr. Hooper fully co-operated. Professor Dugan made a complete and confidential report, public disclosure of which would have been unnecessary and ill-advised."

THE ALLEGED CONSPIRACY TO CONCEAL

The chancellor adopted also the proposed finding of fact in regard to the alleged conspiracy to color and falsify information furnished to the members of the association or to conceal and withhold it from the members. The finding adopted by the chancellor, slightly edited, is as follows.

There is no evidence of any conversation, discussion or request on the part of any defendant director, any Association employee, the defendants Hooper and Robinson, or the defendant Kendrick, wherein any of said parties suggested or requested that any one of said persons or any other person, conspire together to conceal, withhold, color or falsify any information regarding any transaction of the Association from the members of the Association. Nor is there any evidence that any of said persons or combination of persons at any time did in fact conceal, withhold, color or falsify from or to the membership any relevant information in connection with any transaction involving the affairs of the Association.

The members of the Association were at all times fully and adequately apprised of all relevant information regarding the Association's operation through various publications of the Association, including the monthly newsletter and the financial statements prepared by the auditor and published in the annual report which was printed and circulated to the entire membership. Each year an annual meeting was held wherein financial and general operating reports were made to the members by the president and the secretary-treasurer-general manager. Local district meetings, attended by at least one member of the board of directors and representatives of the Association management, were also held to keep the members informed on market conditions and Association operations.

There is no evidence that in any of said publications or at any of said meetings information to which the members were entitled was at any time concealed or misrepresented.

Within a reasonable time after the Dugan investigation had been completed, a 43-page summary of Dean Dugan's report was prepared and read to all interested members at district meetings specifically called for this purpose. And at the same meeting, an 18-page report fully explaining the history of the Embassy acquisition, sale, and discount on the purchase note was also read and fully explained to the members.

The chancellor thought the case had been ably tried and appellants' counsel conceded they had indeed enjoyed "a full and open hearing." We agree on both counts. It occurs to us, however, that the appellants, in many instances, seem to have lost sight of the fact that what we said in *Parish* was based entirely upon the allegations in their voluminous bill of complaint and not upon evidence. At trial they elected to provide most of that evidence through the testimony of a number of the defendants (appellees), including Remsberg, Hooper and Kendrick, and employees Click and Snyder, all of whom were clearly adverse witnesses, and by the testimony of Merrigan and Clifford who, while perhaps not adverse in the statutory sense, Code (1965 Repl. Vol.), Art. 35, § 9, could hardly be called friendly. Mrs. Parish, Wharff and Wenger were the only appellants who gave testimony. A vast quantity of documentary evidence found its way into the transcript. Robert M. Goldman, Esq., executor and quondam attorney for Robinson, gave testimony on behalf of Robinson's estate. The deposition of Col. Hughes was admitted. It was stipulated that Dean Dugan, if called, would testify that the Robinson and Hooper releases "were fair and justified and were in the best interest of the Association." It was stipulated also that each of the directors who did not give testimony would say, if called, that he did not, at any time, have a conversation with Wayne Kendrick or any other person in respect of "the submission of false or misleading information to the Association membership or the concealment of material information from the Association membership." The appellants are bound by most of the testimony, *Callahan v. Reynolds*, 254 Md. 625 (1969), and in respect of the remainder very little, if any of it, seems to have been rebutted, contradicted or discredited. Appellants contend, of course, that the evidence would support their own proposed findings of fact. We express no opinion in this regard but it can hardly be doubted that even if the evidence could be said to support the findings of fact they have proposed it also supports the findings made by the chancellor and our examination of this long and tedious record has fully persuaded us that his judgment in this regard was not clearly erroneous. Indeed we cannot recall a single finding of fact which has been challenged by the appellants as being clearly erroneous. This leads us to the question whether the chancellor applied the proper standard of care in his appraisal of the conduct of the directors.

THE CONCLUSIONS OF LAW

The standard to be applied depends, in most instances, on the relationship of the parties. Scott, in his treatise, V Scott, *Law of Trusts* § 495, 3534 (3d ed. 1967), puts it this way:

> "We have considered elsewhere the principles which are applicable in the case of express trustees. Similar principles are applicable to other fiduciaries. Such other fiduciaries include guardians, executors and administrators, agents, attorneys, partners, joint-adventurers, directors and officers of corporations. Each of these owes a duty of loyalty to the persons to whom he is in a fiduciary relation, and if in violation of his duty of loyalty to them he seeks to acquire or retain for himself some property interest, he is chargeable as constructive trustee for them. *It is to be noticed, however, that the extent of the duty of loyalty is not necessarily the same in all fiduciary relations, and what constitutes a violation of duty by*

> *one kind of fiduciary does not necessarily constitute a violation of duty by another kind of fiduciary.* The duty of loyalty owed by a trustee to his beneficiaries, for example, ordinarily is more intense than that owed by an agent to his principal, *or that owed by a corporate director to the corporation.*" (Emphasis added.)

The appellants, on the other hand, insist that "the Association is an express trustee of its members' milk and the proceeds thereof and that its directors and managing officers [having] shared the trust obligation of the Association with respect thereto *** are held to a higher standard than that of directors of the ordinary business corporation, which is not a trustee handling other people's money and property." In dealing with the question whether the appellants lacked standing to maintain this action the chancellor thought there was a "fiduciary relationship subsisting between the members and the Association as a result of the consignment to the Association of their produce." But, he said, "the Cooperative Code provisions [Code (1966 Repl. Vol.), Art. 23, § 349] are cast in the mold of the corporation law of the State of Maryland." He continued:

> " *** We do not think that the simon-pure relationship that governs between cestui que trust and trustees are necessarily imported into the relationship that subsists between the Association and its members. See *Scott on Trusts,* Volume Five, Section 495, at page 3534.
>
> "In other words, we think there is a fiduciary relationship which gives these former members a right to maintain this action, but we, nevertheless, find and hold that the standard applicable to the directors upon the Bill of Complaint of the complainants in this case is the same standard as would apply generally with respect to the officers and directors of

> a stock corporation or a commercial organization which is a corporate entity. That standard we are all familiar with namely, that *such officers and directors are liable for gross and culpable negligence.* (Emphasis added.]
>
> "The familiar provisions, also, we think, of corporation law would obtain here with respect to the right or not of a court to intervene in the interal affairs of a corporate organization."

We think the chancellor has stated quite accurately the standard against which the conduct of the directors must be measured. In *Parish,* Judge Barnes said, for the Court:

> "It is well established that courts generally will not interfere with the internal management of a corporation at the request of a minority stockholder or a member. The conduct of the corporation's affairs are placed in the hands of the board of directors and if the majority of the board properly exercises its business judgment, the directors are not ordinarily liable. This sound general rule, however, is subject to the important exception that directors *will be held liable* if they permit the funds of the corporation or the corporate property to be lost or wasted *by their gross or culpable negligence.*" 250 Md. at 74. (Second emphasis added.)

To the same effect see *Coffman v. Maryland Publ. Co.,* 167 Md. 275 (1934); *Burkhart v. Smith,* 161 Md. 398 (1932); *Securities and Exchange Comm'n v. Chenery Corp.,* 318 U.S. 80, 85-86 (1943); Henn, *Law of Corporation* § 235 (2d ed. 1970).

The chancellor concluded that the purchase of Embassy amounted neither to gross negligence nor culpable mismanagement on the part of the directors. We agree. They had good and sufficient reasons for making the business decision to acquire Embassy. They obtained appraisals from competent and independent appraisers. They sought and received the advice of eminent counsel of whose expertise there is little doubt. It is a fact, as we see it, that the purchase of Embassy was far from being a disaster. It returned a profit of over $5,000,000 during the five and one-half years it was owned by the Association and even after the divestiture ordered by the Supreme Court it continued to be a substantial buyer of the Association's milk. The chancellor commented that the "matters [concerning the purchase of Embassy] were carefully considered." He continued:

> "The financing was arranged through the Baltimore Bank of Cooperatives. The Department of Agriculture supported the acquisition of Embassy. One thousand members of the Association participated in [the] financing of it by their subscriptions. The Association's agents and representatives at district meetings of the Association throughout the various ~~districts~~ presented to the members of the Association the facts with reference to the acquisition and the method of financing, as they later did with the Dugan Report."

It seems fair to say that if the Embassy purchase were the only basis for the appellants' complaint this suit would never have been filed.

In respect of the purchase of the Richfield stock the chancellor said:

> " *** [A]s to the business judgments exercised by the defendant directors, it appears to the court that at the time they made this acquisition, while we may now debate its wisdom, on the basis of the facts as they appeared to them, this cannot be said to be a

> grossly and culpably negligent decision for them to have made. They made it at a price which was not an unreasonable price. They made it at a time when the customer of that particular dairy represented a substantial segment of the market. To them undoubtedly it seemed that this was, especially in the light of the fact that the company was in debt substantially to the Association, that this was conceivably a way of protecting themselves in acquiring not only a dairy and its customers but also its physical properties. This was not an indiscreet or unwise decision. We may quarrel with it now many years after the fact, but the court cannot say as a matter of fact or certainly as a matter of law that the acquisition of Richfield-Wakefield was a mistake of negligent or grossly negligent proportions."

We agree. The chancellor might also have pointed out that Richfield had been marketing about $5,000,000 worth of milk annually, 80 percent of which came from the Association, and that for $375,000 the Association was able to acquire a facility which, it was said, would have cost in excess of $2,500,000 to build and develop. There was also the alarming possibility that Richfield might be snapped up by one of the national dairies that had expressed an interest in it. We think the directors were justified in relying upon counsel's opinion that the purchase would be unjobjectionable from an antitrust standpoint since it "was primarily a salvage operation designed to prevent a very substantial loss" and was not part of a program of development or expansion. The chancellor did not discuss appellants' objection to the "write-off" of the Richfield stock but as we see it there was no need for him to do so.

Considering the fact, as the chancellor found, that the sale of Embassy resulted in a gain of $465,794.41 to the Association and the fact that the Supreme Court's decision left the directors no choice but to sell (within a year) it is

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difficult to categorize the action of the directors in doing so as grossly negligent or to say that what they did amounted to culpable mismanagement. Indeed it becomes impossible to do so when one considers that the purchase price (less the $500,000 discount) was paid in full and that the Association continued to sell much of its milk to Embassy. The appellants contend that the failure to pursue Philipson's intimation of a $4,000,000 offer was reprehensible but we do not see it quite that way. The identity of the principal was not disclosed and the details of the proposal were not revealed. An important factor was the expectation that Embassy would continue to buy milk from the Association. Berger assured the Association that it would continue to be Embassy's principal source of supply. The chancellor found as a fact that the assurance given by Berger was honored and that, as of 5 January 1970, Embassy continued as a customer. Such an assurance from an undisclosed source would seem to us to have had little meaning. As the chancellor pointed out "[t]here were others, similarly unidentified, and there were the employees *** of the Embassy division who had not the means to finance such a purchase." "It seems," he observed, "that they [the directors] did everything they responsibly could do." While it all might have been done differently, perhaps even more advantageously to the Association, nevertheless we see nothing in the way of gross negligence or culpable mismanagement.

In respect of the discount allowed Berger the appellants speak of it as a "loss" of $500,000, a view neither we nor the chancellor would seem to share. It is beyond dispute that Berger's companies made prompt and full payment of all obligations due the Association arising out of their purchase of Embassy. Nevertheless the news that Berger had sold Embassy to Southland Corporation was disturbing despite Berger's great wealth and the fact that Southland (owner of the Seven-Eleven stores) was a very responsible company. The Association naturally wanted to be paid in full out of the millions in cash coming into Berger's possession but Berger took the position that his companies had never defaulted, that he was under no obligation to anticipate payment, and that in the future the Association could expect to be paid on the nail. He did, however, indicate a willingness to prepay if the Association would give him a discount of $1,000,000. Negotiations in this regard ended in an agreement to pay $500,000, the amount of the final payment due 12 years hence. At the time Embassy was buying $7,000,000 worth of the Association's milk each year. The directors also compared the value of the immediate payment of $2,300,000 to the payment of $2,800,000 over a period of 12 years. The result of their calculations in this regard is not clear but there is no doubt there was much soul-searching before the final decision was reached. The appellee Giles H. Miller, Jr., was,at or about that time, president of the Virginia Bankers Association and, according to Merrigan, at Miller's request "the top bankers in the whole State of Virginia went over this in the most thorough detail." Merrigan said other bankers had been consulted and that he himself had telephoned his brother, a bank president in Louisiana, who advised him "categorically that if *** [the Association] could collect the $2,300,000 in '63 it would be better than waiting for $2,800,000 in 1975." The chancellor concluded, and we agree, that:

> "In the process, the Association came into possession at that time of cash money in excess of $2 million, as we recall it $2,200,000, with which to finance their operations. There is credible testimony in the record that by so doing they saved a substantial amount of interest in borrowings.
>
> "Overall, *** the discount arrangement was an act of reasonable business judgment, debatable as such judgments are,but certainly not an act of negligence. It has been attacked for very cogent reasons, persuasively urged upon the court. Mr. Hooper, for example, said they should 'ride' with it, that he did not consider the discount 'necessary.'[5]

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[5] Hooper also said he thought the majority was "probably right."

> Some of the directors may have held the same view. We do not recall the vote at this point, but a substantial majority of the board voted to approve the discount. In retrospect we think, and current events probably support the conclusion with high interest rates at the present time, that their decision was all-in-all a reasonable act of management."

An odd facet of the matter of the discount is the following footnote appearing on page 12 of the brief filed on behalf of the appellants Wharff and Wenger, the only appellants represented by counsel:

> "Upon a careful review of the testimony, these Appellants have concluded that the allowance of the discount by the 1963 directors was a *prudent and necessary act required by the situation* brought about by the prior boards of directors, and have determined not to press any claim against the 1963 directors as such with respect thereto." (Emphasis added.)

We think the chancellor properly concluded that the directors exercised sound business judgment when they decided to purchase Harrison, and that the price paid was not excessive. Appellants argue that because Dean Dugan, *in 1964*, discovered and reported Robinson's perfidy in his operation of Harrison that the directors were guilty of gross and culpable negligence when they purchased it in 1961. Had they known in 1961 what they learned in 1964 there can be little doubt their course of action should and very likely would have been quite different. We agree with the chancellor's comment:

> "It has been urged upon the court that this was a foolish and unwise thing to do, to purchase this facility because it was solely to get rid of a conflict of interest. There is some surface appeal to this argument. However, upon analysis, it appears to the

court that there were other considerations involved which had to be taken into account, and we think it is a legitimate inference from the evidence that they were taken into account at that time.

"The evidence before us as to the Florida market establishes that it was not inconsequential by any means, but rather an important market that the Association had been selling to previously through Galloway West, an organization that was taken over by Borden's. Mr. Hooper's testimony disclosed to the court the importance of this market and the difficulty of getting in there because of permit restrictions.

"At the time the board had before it for consideration the decision of what to do about Harrison, the alternatives would include, perhaps, the sale of it to a competitor, not a wise thing to do. Or the sale of it to some outside party. In either eventuality, the Association would lose its foothold in Florida.

"We cannot say at this juncture that their decision, which we think was really a two-fold one, to get rid of the conflict of interest and to pick up a facility comparable to others we have heard of in this record, a facility that could be of value to the Association, was an unwise or negligent action."

* * * * * * *

"The directors who testified on the stand with reference to this [the price paid] gave their opinion that at that time it was considered to be a going concern worth more than its book value, and it was on this basis that it was purchased and merged into the Fluid Division.

> "The court cannot say, on the basis of the record before us, that this was an unwise thing to do at that particular moment and that the directors were grossly and culpably negligent for so doing."

As the chancellor said "[t]he conflict of interest was indeed plain, but the true proportions of it did not come to light" until November 1963 when Click submitted his resignation and accused Hooper and Robinson of assorted skulduggery. As we have said, the Chancellor concluded the board acted "very responsibly" in the employment of Dean Dugan whose qualifications in this regard have already been stated. The directors can hardly be censured for this decision.

When Dean Dugan reported the results of his investigation and Kendrick's audit to the directors Hooper's resignation was requested. When he refused to resign he was discharged. Robinson's contract had not been renewed after it expired on 31 December 1963. Merrigan and Dugan were thereupon directed to recover from Hooper and Robinson whatever monies might be due the Association. For the moment we shall defer our discussion of the settlements made with Hooper and Robinson.

We think the findings of fact in respect of a conspiracy to conceal or withhold information make it clear that these charges are not supported by the evidence. And since the charges appear to be aimed chiefly at Kendrick a brief comment seems in order. Kendrick was produced as a witness by the appellants. He testified that his work was consistent with good, sound, standard accounting procedures, that his reports were delivered by him to the directors, and that he had nothing to do with their distribution to the members. His testimony stands unrebutted and uncontradicted. *Callahan v. Reynolds*, 254 Md. 625, 629 (1969). The appellants have produced no testimony expert or otherwise, that any of Kendrick's reports were in any way incorrect, improper, false, misleading or that they were not prepared in accordance with sound accounting practices and procedures. We join in the chancellor's belief that

> "*** this is a man of substantial integrity and we do not find that the evidence in this case sustains the contention that there was any conspiracy on his part to conceal, misrepresent, or defraud or in any way do anything other than follow sound accounting principles and practices."

We shall now revert to the contentions made in respect of the settlement with Hooper and Robinson and the releases executed pursuant thereto. In this regard one must be mindful of the fact that the question now before us is not quite the same question that was before us in *Parish*. On November 6 1969, during the course of the trial on the merits, the appellants abandoned the following subparagraphs of the bill: 18(a), charging Robinson with acquiring large tracts of unneeded land near Laurel and selling them to the Association at a substantial profit; 18(b), charging Robinson with acquiring a milk plant near Laurel and selling it tothe Association at a "large and unconscionable profit" to himself; 18(f), charging Robinson with requiring Association products to be hauled in trucks owned by him; 18(h), charging Robinson with employing inexperienced and incompetent relatives of himself and Hooper in positions of trust at the Laurel plant and elsewhere. The Dugan report was not before us in *Parish* nor were we aware of the results of the investigations made by Merrigan and Kendrick along the lines suggested by Dean Dugan in his report. Absent also was the uncontradicted testimony that Kendrick had seen both sides of all transactions involving the sale by the Association of milk products to either Mutual Milk Sales, Inc., or Mutual Milk Sales Packaging Division, Inc., and the fact that no other sales of dairy products were made by the Association to any other corporation with which Robinson had any connection.

The release to Robinson and Hooper entitled "General Release" has the usual general release verbiage, after which the following language appears:

> "*** including, but in no respect limited to, any matter, cause or thing whatsoever growing out of (a) the purchase by the Party of the First Part from the Parties of the Second Part of the stock in Harrison Dairy Products, Inc., (b) the agreement of April 12, 1962 by and between the Party of the First Part and the Parties of the Second Part regarding the purchase and sale of the said stock in Harrison Dairy Products, Inc., and (c) certain claims of the Party of the First Part against Arthur V. Robinson, Mutual Milk Sales Inc. and/or Mutual Milk Sales Packaging Division, Inc., and/or William B. Hooper in the sum of approximately $235,000; it being fully understood and agreed however, that the payment and releases set forth hereinabove, being part and parcel of an amicable settlement voluntarily tendered of all outstanding claims among the parties named hereinabove, in no respect evidence or constitute admissions or concessions of legal liability or wrongdoing on the part of any of the parties hereto."

The directors, after a full explanation by counsel on 14 March 1964, approved the releases from the Association to Robinson and Hooper and from them to the Association. They were executed on 30, 31 March and 1 April.

The applicable principles of law were stated by Judge Barnes, for the Court, in *Parish:*

> "*** Ordinarily a defense based upon a release is complete. A release, however, is a contract and may be set aside for the same reasons for which any other contract may be avoided. *Thomas v. Erie Insurance Exchange,* 229 Md. 332, 182 A.2d 823 (1962). If the release is obtained by fraud, it may be set aside for this reason. *Spitze v. B & O Railroad Co.,* 75 Md. 162, 23 A. 307 (1892). In addition to actual fraud, which is not alleged in the complaint, when the

> release is challenged, a party to it who stands in a confidential relationship to the other party has the burden of showing that the release was not obtained by fraud, undue influence or over-reaching. See *Indurated Concrete Corp. v. Abbott*, 195 Md. 496, 74 A. 2d 17 (1950).
>
> "In our opinion the complaint alleges sufficient facts to indicate, *prima facie*, that Robinson, as well as Hooper, did stand in a confidential relationship to the Association and they have the burden of establishing that the general release given by the Association to them in 1964 was not obtained by their fraud, undue influence or over-reaching. It may be that either Robinson or Hooper, or both, may be able to allege in their answers and prove at the trial of the case on the merits that the general release was obtained in an arms-length transaction, untainted by fraud, undue influence or over-reaching on their part and when the Association had, or should have had, a full and complete knowledge of the relevant facts concerning the matter, but the burden of showing all of this is upon Robinson and Hooper." *Id.* at 101-102.

Perhaps, at this point, one ought to recall the distrinction between "burden of proof" and "burden of evidence" or as it is usually called, "the burden of going forward with the evidence." The burden of proof, i.e., the risk of non-persuasion, never shifts from the party on whom it is placed. The burden of going forward with the evidence may shift during the course of the trial. *Operations Research, Inc. v. Davison & Talbird, Inc.*, 241 Md. 550, 574 (1966). But it should be observed that the burden of proof is satisfied by the actual proof of the facts which need to be proved, *regardless of which party introduces the evidence. Blacher v. National Bank of Baltimore*, 151 Md. 514, 523 (1926); 31A C.J.S. *Evidence*, § 104, 176 (1964); 29 Am. Jur. 2d, *Evidence*, §127 (1967).

It is abundantly clear that the "general release was obtained in an arms-length transaction." Both Robinsons and Hooper were represented by competent and aggressive counsel; the Association was represented by Merrigan and Dean Dugan. It was said that during the negotiations, which went on for some six weeks, there "were very acrimonious discussions." We have not been shown, nor have we found, any evidence suggesting there was a taint of "fraud, undue influence or overreaching" on the part of Robinson or Hooper. The directors seem to have relied exclusively on Dugan's transcript and report, the documents compiled by Dugan and Kendrick, the additional investigations made by Merrigan and the employees, and upon the advise of counsel. There seems to be no doubt about the fact that the directors had "a full and complete knowledge of the relevant facts concerning the matter."

Appellants regard as both significant and important the further comment of Judge Barnes in *Parish*:

> "In short, under the facts and circumstances alleged and the reasonable inferences from those facts and circumstances, Robinson (as well as Hooper) has the burden of showing that the general release was fair, free from fraud, undue influence and over-reaching, and that the Association executed the general release with full knowledge of the applicable facts. By the facts appearing in exhibit G, already referred to above, it is clear that so far as Robinson is concerned, the Association did not receive the Mutual books, demanded by the general counsel of the Association, prior to the execution by the Association of the general release. It thus appears, *prima facie*, that the Association did not in fact have full and complete knowledge of the amounts and details of Robinson's misconduct in the Mutual transaction at the time the general release was executed. It is clear from the authorities that a general release of a person standing

> in a fiduciary relation to a corporation does not release such a person even though the official relationship of that person to the corporation has been terminated in substantial time prior to the execution of the release. *There still must be a full and frank disclosure by the person in the fiduciary relationship in order to sustain the effectivenes of the release.* *Irving Trust Co. v. Deutsch,* 73 F.2d 121 (2d Cir. 1934). See *Stevens v. Marco,* 147 Cal. App.2d 357, 305 P. 2d 669, 684-85 (1956). *Cf. Hawker v. Worley,* 33 F. 2d 491 (8th Cir. 1929). *Id.* at 104-105. (Emphasis added.)

The exact language used in "exhibit G," referred to by Judge Barnes, is as follows:

> "The Association, through its General Counsel, Mr. Merrigan, formally requested Mr. Robinson to produce the books of [Mutual Sales and Mutual Packaging] to show exactly why a price differential or mark-up was allowed to Mutual, but while Mr. Robinson agreed to cooperate, he finally limited this production to sales invoices only. The books of the Mutual corporations were never produced."

Merrigan's letter (the formal request) of 7 January 1964, asked for "whatever purchase-sales records and books *** might be available to show the picture at the other end of Mutual's purchases from the Laurel plant." Two weeks later he renewed his request that Robinson "make available to Mr. Kendrick's representatives all of the *pertinent sales books and records of*" Mutual. (Emphasis added.)

It seems to us, as Robinson's executors argue, that Robinson did produce the records Merrigan asked him to make available. Merrigan, testifying at the trial, said, " *** what we were interested in we got. We wanted the additional sales books and what we were interested in was trying to get the other end of the transactions with Mutual, which we got."

The chancellor, as we have said, found as a fact that "Kendrick examined each sale on the Association's books and also *** [Mutual's] sales records which showed the other side of each transaction." Kendrick established a gross profit of $100,256.23 to Mutual–the same figure mentioned in the "exhibit G" in *Parish*. The chancellor also found as a fact that "no other sales of dairy products were made by the Association to any corporation with which Robinson had any connection" (except Harrison, of course). There is no evidence that any other books or records were thereafter requested or that access to them was refused by Robinson. Appellants, however, point to the following paragraph in Kendrick's letter of 6 February 1964 to Dean Dugan:

> "We requested copies of income tax returns and correspondence with Weldon Farm Products, Inc. The certified public accountants to whom we were referred advised that they had authority to permit us to examine the sales invoices mentioned above, but could not let us examine any other papers."

The accountants' caution is certainly understandable but, as we have said, it does not appear that a further request was submitted to Robinson or that he refused any such request. We think it is clear that the direc~~tors, the~~ir attorneys, and their accountants were completely satisfied, in light of their own investigations, that the maximum amounts recoverable from Robinson were, in respect of Harrison, $135,529.67, and in respect of Mutual $100,256.23. These figures formed the principal basis for the Association's claim of $235,000 against both Robinson and Hooper and, it will be recalled, all claims arising out of Harrison and Mutual were specifically released.

Appellants still insist that "a full and frank" disclosure has not been made by Robinson and that therefore the release is ineffective. We certainly did not intend, in *Parish*, to create the impression that a "full and frank disclosure" would be meaningless unless made by the releasee personally. As long as the release can demonstrate to the trier of facts that a "full and frank disclosure" of all relevant, pertinent and significant facts and circumstances has been made to the releasor it would seem not to matter that they were elicited from sources other than the releasee himself. The releasee, of course, cannot escape from the burden of proving the arms-length transaction, the absence of fraud, undue influence or over-reaching and the releasor's knowledge of all relevant facts. *Parish* at 101-102.

Considering the wide latitude given to the appellants in their extenseive and unlimited pretrial discovery procedures and their careful resifting at trial of every aspect of the Association's investigation before the settlement and the execution of the releases, it is indeed extraordinary that they have been unable to point to a single *relevant* fact withheld or concealed by Robinson or about which the directors had no knowledge. We think it is clear, on this record, that the directors had all the information they needed, all they wanted and quite likely all that mattered.[6] Counsel (Merrigan and Dean Dugan) gave them in great detail both sides of the settlement question. They emphasized that

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[6] Merrigan's statement, elicited during the trial,seems especially significant in this context:

> "Q. Let me ask you this, then, sir: Do you presently know of any other claims that can be asserted against either Mr. Hooper or Robinson that were not released by the releases executed April 1, 1964? A. The answer to that is no, I know of no other claims against Hooper and Robinson that weren't covered by that release, I have searched my mind on this subject all during this trial and litigation as to what could have been done differently, and taking into mind everything I knew then and now and consider all of the facts and circumstances and the cost of litigation and the answer is absolutely no. If I had it to do over again today I would do it the same way as we did it then after five years of litigation."

> "[a]micable, private settlement of these conflicting claims continues to avoid adverse publicity for all concerned, which, in and of itself is of inestimable value to an Association doing $40,000,000 worth of business in this area of the United States. It also eliminates any further internal disruptions, and the Association can go about its business during a very difficult period without the constant distraction of bitter litigations, with nasty side effects."

Counsel concluded by stating:

> "The board must weigh the value of a full amicable settlement of the existing claims, with the concomitant avoidance of litigation, against the uncertainties here involved. Bear in mind, however, that no additional *specific* claims are presently assertable or known. If any exist, they would *possibly* come to light only after (a) completion of a physical appraisal at Laurel, (b) further fact finding and audits, (c) further testimony. Not only will the last two mentioned items be costly, but they will be more difficult than ever to pursue now that the Robinson family is no longer employed at Laurel, and it is doubtful that any would cooperate, as in the past, in testimony or in producing books and records of their outside operations."

The chancellor held, in respect of the "narrow question" as to whether Robinson's estate and Hooper might avail themselves of the release, "—based upon all the evidence here—that they can and that this release bars the claim against them." We agree and it should be obvious that if the release is sustainable as to Robinson's estate then a fortiori the same is true as to Hooper.

We have been urged, rather strongly, by the appellees to decide whether the appellants have standing to sue the directors or Robinson's estate and Hooper but we shall not extend this seemingly endless opinion with a discussion of those troublesome questions simply because a decision is not required.

Neither is it necessary for us to decide whether the chancellor erred in dismissing Frank Parish as a party to the suit. Even if we were to say that his dismissal was not justified the result reached here would be no different.

We are mindful of the fact that there are a number of subsidiary contentions, arguments, petitions, and motions which have not been decided, discussed or mentioned. That they have not been dealt with means only we have thought it unnecessary to do so, not that they have been overlooked or ignored.

The appellants Wharff and Wenger, in their Reply Brief, have suggested a "general scheme of relief" premised, of course, on our reversal of the chancellor's decree. In their supplemental brief counsel for the Association point out, rather bitterly to be sure, that "this litigation has already cost the Association and its members some $200,000 to defend and considering that appellants now propose to saddle the Association with all of their costs and fees ***, how much, we ask, would the Association have to recover in this case *just to break even?*" This brings to mind the resolution unanimously adopted by the 1969 annual meeting of the members of the Association, a part of which is set forth below:

> "WHEREAS, Messrs. Parish, Wharff and Wenger, persons who are no longer members of this Association, are continuing to maintain and press what they describe as a 'membership action' or derivative action brought for the benefit of the members here of this Association against the Association and its directors and former directors; and

"WHEREAS, the defense of that action has already caused the Association to lose more than $100,000 in legal fees and court costs and threatens to saddle the Association with additional costs and losses which must be borne by its members and no part of which can be currently assessed against Mr. Parish or Mr.Wenger because they are not members of the Association; and

"WHEREAS, the membership of the Association is completely satisfied with the management and financial condition of the Association and in no respect desires that the Parish lawsuit be continued or maintained for its alleged benefit in any form; and

"WHEREAS, the continuation of the said suit and the claims asserted therein are making it more and more difficult for the membership to find persons who are ready and willing to serve as directors of the Association;

"Now, THEREFORE, BE IT RESOLVED:

"(1) That the membership of this Association be recorded as absolutely opposed to the continuation of the suit brought by Messrs. Parish, Wharff and Wenger against the Association and its directors for the alleged benefit of all members of the Association.

"(2) That the membership itself take any and all actions available to it to terminate that lawsuit at the earliest possible date ***."

Perhaps our decision here will bring this litigation to a conclusion. Thus endeth the lesson.

DECREE AFFIRMED.

COSTS TO BE PAID BY THE APPELLANTS.

Joint Motion for Reargument Filed June 3, Denied, June 4, 1971 by Letter

June 4, 1971

Mr. Frank P. Parish
Route 1
Thorndale Farm
Taneytown, Maryland 21787

Dear Mr. Parish:

The Court has considered the joint motion of appellants, filed June 3, 1971, for reargument in the case of *Frank P. Parish et al. v. Maryland and Virginia Milk Producers Association, Inc. et al.*, No. 246, September Term, 1970, and, for your information, said motion was denied this date.

The mandate and the original papers have been forwarded to the Circuit Court for Montgomery County.

A copy of the mandate is enclosed.

Very truly yours,

/s/J. Lloyd Young
Clerk